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# IF NOT A COMMERCIAL REPUBLIC? POLITICAL ECONOMY IN THE UNITED STATES AFTER *CITIZENS UNITED*

David A. Westbrook\*

## I. INTRODUCTION

In January of 2010, the Supreme Court decided *Citizens United v. Federal Election Commission* (*Citizens United*), striking down federal law regulating the participation of corporations in election campaigns, thereby allowing for-profit corporations to make essentially unrestricted campaign expenditures from their general funds.<sup>1</sup> The source of such payments did not necessarily have to be disclosed effectively, or in some instances, at all.<sup>2</sup> The *Citizens United* decision was immediately controversial in the press,<sup>3</sup> among legal scholars,<sup>4</sup> and even with the President in Congress.<sup>5</sup> Polls showed eighty percent of the public disagreeing with the decision.<sup>6</sup>

One might be forgiven for asking why, exactly, is *Citizens United* so important?<sup>7</sup> Surely the general problem of money in U.S. politics is not new,<sup>8</sup> and both the First Amendment and election law address perennial difficulties

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<sup>1</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).

<sup>2</sup> See *id.* at 913–17.

<sup>3</sup> Comment, *Citizens United v. FEC: Corporate Political Speech*, 124 HARV. L. REV. 75, 80 (2010). See, e.g., David D. Kirkpatrick, *Lobbies' New Power: Cross Us, and Our Cash Will Bury You*, N.Y. TIMES, Jan. 22, 2010, at A1.

<sup>4</sup> See, e.g., Ronald Dworkin, *The "Devastating" Decision*, N.Y. REV. BOOKS, Feb. 25, 2010, available at <http://www.nybooks.com/articles/archives/2010/feb/25/the-devastating-decision/>. Dworkin is cited here due to his alacrity and prominence. The substantial and generally disapproving literature on *Citizens United* will be cited throughout the text.

<sup>5</sup> See Robert Barnes, *In the Court of Public Opinion, No Clear Ruling*, WASH. POST, Jan. 29, 2010, at A1; see also Joan Biskupic, *Judicial-Political Friction Causes Sparks to Fly—Supreme Court Observers See Rise in Tension Between Justices, Elected Leaders*, USA TODAY, Jan. 15, 2011, at 4A.

<sup>6</sup> Dan Eggen, *Corporate Sponsorship Is Campaign Issue on Which Both Parties Can Agree*, WASH. POST, Feb. 18, 2010, at A15.

<sup>7</sup> See, e.g., Adam Liptak, *A Drop in the Bucket*, COLUM. L. SCH. MAG., Fall 2010, available at <http://www.law.columbia.edu/magazine/54665/a-drop-in-the-bucket> (suggesting that it is "hardly clear that the case will have anything like the dire consequences its critics predict").

<sup>8</sup> See THOMAS JEFFERSON, 2 THE PAPERS OF THOMAS JEFFERSON 545 (Julian P. Boyd ed., Princeton Univ. Press 1950) (1779) ("[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical.").

for a democratic republic. Moreover, it is very difficult to establish a correlation between money spent and elections won.<sup>9</sup> So why has the *Citizens United* decision poured so much gasoline on the fire?

What makes *Citizens United* so disturbing is that the case signals a rupture in our constitutional tradition. A majority of the Supreme Court abandoned the traditional understanding of the social geometry of U.S. political life, in which (i) elections and other democratic processes, (ii) judicial and other legal processes, and (iii) markets are understood to be distinct and reinforcing modes of social decision.<sup>10</sup> This is no small thing: for most of its history, the U.S. legal tradition understood the nation to be a commercial republic,<sup>11</sup> a society in which political processes, legal processes, and economic processes are in a tripartite equipoise. What *Citizen United* calls into question is whether this idealization of the United States remains credible.

In failing to recognize (or perhaps understand) the distinctions between democratic and economic modes of self-governance, the Supreme Court suggests that this traditional conceptual grammar is losing its plausibility even among legal elites, a generally conservative group.<sup>12</sup> In place of the tripartite social geometry that defines a commercial republic, the Court employs a much simpler dualistic model of American public life. In this view, an undifferentiated society, dominated by its markets, constitutes its rulers through periodic and formally neutral political processes: elections. The rulers, in turn, are legally prohibited from direct interference with electoral processes. Civil society chooses its rulers; the rulers may not interfere with the processes by which it does so. If enforced, the Court's dualist vision of society is incompatible with vital aspects of a commercial republic, including both traditional beliefs about legal discourse and assumptions that markets are fair. More pointedly, if civil society is essentially a market society, then we may expect elections to be dominated by those who speak loudest in markets, the wealthy. If the wealthy elect

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<sup>9</sup> The influential columnist David Brooks points out that there is often little or no correlation between campaign spending and election outcomes. David Brooks, *Don't Follow the Money*, N.Y. TIMES, Oct. 20, 2010, at A31. Brooks usually has a better sense for, and more sympathy with, the concerns underlying public reaction.

<sup>10</sup> For a prescient statement of the problem, see generally Timothy K. Kuhner, *The Separation of Business and State*, 95 CALIF. L. REV. 2353 (2007). Kuhner argues that constitutional jurisprudence could come to see the relationship between "business" and "state" in the same Madisonian fashion in which the relationship between church and state, or between the state and federal governments, have long been seen. *Id.* at 253.

<sup>11</sup> The leading tradition in opposition might be called willfully agrarian, ranging from Jefferson to the Agrarian movement at Vanderbilt in the mid-20th Century to various aspects of the counter-culture in the 1970s. Such visions of what the U.S. polity might mean have never achieved dominance.

<sup>12</sup> As the historian J.G.A. Pocock influentially pointed out some years back, political constellations have lives, with endings. See J.G.A. POCKOCK, *THE MACHIAVELLIAN MOMENT* 84 (1975).

rulers to serve their interests, we have government by and for the privileged classes—oligarchy.

Thus, *Citizens United* implicitly asserts, and may come to stand for, the proposition that we have become a new, and very different, United States. The point here is not that money did not use to matter in U.S. politics; money always matters. At issue is whether there has been a seismic shift in the ideology or imagination, or normatively the ideals and virtues, that we use to think through and organize our lives together. The imaginary is hardly permanent.

There are many ways to confront the possibility that our political grammar, and perforce, our Constitution, is changing, but this Article takes the following three interrelated approaches. First, as discussed in Part II below, the Court's decision, in which the Justices voted along party lines, has been widely alleged to be "political." In considering such criticism, a very basic and rather old-fashioned point must be emphasized: the concern is whether the Court's *decision*—the process through which the institution reached its conclusions and issued an order—was "political," using that word pejoratively, as opposed to "legal." Just suppose, however, as this Article argues, that such allegations are convincing. Then how is the legal community, and most particularly, legal scholarship, to respond?

If the presumption of good faith legal argument does not hold, then legal scholars must find some other way to respond to a Supreme Court case or move on to other topics. And Supreme Court cases do seem to be important still, even cases that we may believe to be disingenuous or otherwise unworthy. Part II of the Article maintains that while we may not be able to understand opinions as arguments, invitations to open debate in which minds just might be changed, we may, and indeed must, take Supreme Court opinions seriously as political expressions, or, to sound anthropological, as artifacts of power.<sup>13</sup> Without rearguing the case, we might ask, what does the *Citizens United* decision say about our politics, at least as seen from the very significant perspective of the Court?

This turn to interpretation—in lieu of argument—brings us to this Article's second approach to the *Citizens United* opinion. As has already been suggested, the decision may come to mark a fundamental shift in the way the nation's political economy is imagined. In Part III, a close reading of the majority opinion reveals the dualistic structure of the Court's imagination of U.S. society. Although useful for thinking about sovereignty, this dualistic imagination is of little help in thinking through how civil society, including

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<sup>13</sup> See generally DAVID A. WESTBROOK, NAVIGATORS OF THE CONTEMPORARY: WHY ETHNOGRAPHY MATTERS (2008).

the markets that do so much of our society's work, is constructed.<sup>14</sup> The Court's dualistic imagination of the U.S. political economy may be contrasted with the imagination traditional in U.S. law, especially commercial law. In this more nuanced view, our public and economic order is a commercial republic, in which different modes of interaction (payment, voting, reasoned argument) define different aspects of public life (markets, elections, law).

The third approach taken by this Article to *Citizens United*, and by extension, to the question of the extent to which it makes sense to consider the United States in frankly oligarchic terms, is to look at *Citizens United* as a case about corporations making payments, that is, in terms of capitalism rather than elections. Despite the fact that the *Citizens United* opinions are preoccupied with the influence of corporations, the opinions pay almost no direct attention to markets.<sup>15</sup> What little attention is paid to markets by the Court is grounded on an electoral, as opposed to commercial, understanding of social participation. That is, the Court displayed little understanding of how marketplace institutions actually function.

*Citizens United* has been analyzed, and argued over, almost exclusively in terms of the First Amendment and of the influence of money upon elections, which are core issues of democratic politics.<sup>16</sup> But the traffic among our political mechanisms flows both ways. What about the influence of laws upon money, elections upon markets? After all, *Citizens United* is explicitly a challenge to laws that regulate corporate behavior, that is, about the influence of lawmakers on markets. More broadly, the case is significant not only for how we understand elections, but also for how we understand the markets that inform so much of American life.

Drawing on very traditional notions of corporate governance, business practice and regulation, and competition, this Article argues that the marketplace envisaged by the majority in *Citizens United* is anything but a sound market and is, in fact, at odds with the U.S. legal tradition. What specific aspects of traditional political economy will be displaced or destroyed? *Citizens United* concerned payments made by a corporation in what is sometimes called the "marketplace of ideas." The Court argued, and the dissent responded, in terms of speech, persons, and elections. But this

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<sup>14</sup> For much more on thinking about constructed, as opposed to natural, markets, see generally DAVID A. WESTBROOK, *OUT OF CRISIS: RETHINKING OUR FINANCIAL MARKETS* (2010).

<sup>15</sup> See *infra* Part IILB.

<sup>16</sup> In light of the posture of the case, the focus on electoral politics rather than sound markets is not too surprising. The plaintiffs challenged the federal regulation of elections and prevailed on the basis of First Amendment law's extreme solicitude for political speech. See Floyd Abrams, *Citizens United and Its Critics*, 120 YALE L.J. ONLINE 77, 77-78 (2010).

Article uses language that hews more closely to the facts, and thinks about this case in frankly capitalist terms. From this perspective, *Citizens United* concerns payments, corporations, and markets. Articulating *Citizens United* in businesslike fashion allows us to see how profoundly the Court's opinion diverges from our traditional understandings of how markets should work. Specifically, Part IV argues that speech by corporations is either inherently commercial in nature or *ultra vires*. Part V argues that payments, whether understood as transfers of value or communications of information, are regulated in markets all the time. Part VI argues that *Citizens United* virtually requires rent-seeking legislation, and hence undermines competition and sound markets generally.

Such analysis may be a bit wishful, or even eulogistic. *Citizens United* is now the law, even if profoundly at odds with other aspects of our law. This tension within our laws leads this Article to conclude with speculation about the politics implied by different resolutions. Broadly, the commercial republic may be revived. It is conceivable that *Citizens United* will be undone, and that the republic will honor its electoral and commercial traditions. The Article mentions several ways that this step backward, as it were, might be accomplished.

But perhaps the nation will plunge yet deeper into the "democracy" envisaged by *Citizens United*. If *Citizens United* remains the law, then one should ask whether it is sensible to continue idealizing the United States as a commercial republic and structuring legal discourse on the basis of republican virtues. If the United States is frankly acknowledged to be an oligarchy, then the way we think about law, politics, and indeed economy should change accordingly, that is, the way cases like *Citizens United* are now argued should come to seem quaint, outmoded. By the same token, legal scholarship should promote a different set of virtues, presumably virtues more befitting an aristocracy, respect for station, noblesse oblige, a sense of the importance of glory and gravitas where appropriate, and the like.<sup>17</sup> Perhaps such reassessments of where we are and what is to be desired are already happening in intellectual quarters more progressive than mine.<sup>18</sup> Be

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<sup>17</sup> If we concede that the United States has become an oligarchy, then legal education might also change—that is, a mandarin class that serves an aristocracy might have different virtues than a class that serves a republic, and education should vary accordingly. On the other hand, perhaps the function of the mandarin is independent of the style of sovereignty; perhaps Sir Kay and Joseph K always meet in the castle. At any rate, such questions are beyond the scope of this Article.

<sup>18</sup> One might also try to reinvent corporation law so that corporations, as a locus of privilege, behave more responsibly than implied by the shareholder-supremacy norm that has dominated academic legal discourse on the corporation for the past several generations, albeit over the persistent objection of advocates for "stakeholder" concerns. See David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United*, 89 N.C. L. REV. 1197, 1199 (2011). Yosifon seems to believe that a corporation more

that as it may, however, the intellectual and other consequences of such a change in our political imagination are beyond the scope of this Article, which is filled with rather old-fashioned notions of American politics and business.

## II. RECEPTION AND RESPONSE

### A. *Citizens United* As a “Political” Decision

*Citizens United* was immediately, widely, and influentially criticized as “political.”<sup>19</sup> As already mentioned, the word “political” is quite charged in this context: at issue is whether the Court’s decisional processes are founded in “law” or in something else, presumably the preferences of the Justices. But “what the judge had for breakfast” is not an adequate basis for the exercise of power, and in striking down a federal statute and overruling two precedents, the *Citizens United* Court—five votes—exercised a lot of power.<sup>20</sup> So the claim that the decision is “political” is, in this context, an attack on the substantive legitimacy of the decision.<sup>21</sup>

On the other hand, it is naïve to expect judging to be so objective that ideology, the lens through which the world is perceived, does not play a role. And if that is correct, it may be expected that the Justices will vote in patterns, and like-minded judges will tend to vote together, in groups perhaps called the “conservatives” or “liberals.” Those things said, at some point, the influence of ideology becomes unseemly, and it accordingly becomes more correct to speak of “politics” or “ideologies,” or even “prejudices,” rather than “perspectives” or “interpretive lenses.”

To be more specific: Justices Scalia, Thomas, and Alito, along with Chief Justice Roberts, joined the opinion of the Court, written by Justice Kennedy, to strike down § 441(b) and overrule *Austin* and *McConnell* in the

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concerned with stakeholders would *ipso facto* be more “democratic,” but perhaps democratic simply means virtuous, or perhaps usage is mostly advocacy. It is difficult to see how more responsible collectives should not more properly be seen on the analogy to feudal manors or perhaps guilds, especially given the primacy that Yosifon is forced to grant to the board of directors—clearly “democracy” is not how business gets done. And while more virtuous institutions are to be desired, it should be remembered that the interests of the manor are not coterminous with those of the kingdom. “The corporation and its shareholders stakeholders” is hardly the same thing as “we the people.”

<sup>19</sup> See Abrams, *supra* note 16, at 78.

<sup>20</sup> For a historical perspective on this type of approach to adjudication, see JEROME FRANK, COURTS ON TRIAL 161–64 (3d hardcover prtg. 1973).

<sup>21</sup> Americans, with their great respect for the law and the Supreme Court in particular, rarely act on their sometimes genuine feelings that rulings are illegitimate. See James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 535 (2003).

name of an expansive reading of the requirements of the First Amendment.<sup>22</sup> All five Justices in the majority were appointed by Republican Presidents.<sup>23</sup> Justice Thomas wrote an opinion concurring in part and dissenting in part, in which he supported the majority decision with regard to § 401, but argued that the Court should go even further and also strike down the Bipartisan Campaign Financing Reform Act's (BCRA) disclosure requirements as illegal under the First Amendment.<sup>24</sup> Thus, the four members of the Court conventionally viewed as "conservative," along with Justice Kennedy (the judge most often understood as the "swing" vote), voted to strike down substantive aspects of a law duly enacted by the political branches, raising concerns about the power of unelected judges in our democratic tradition at least since *Marbury v. Madison*.<sup>25</sup>

Justice Stevens wrote a lengthy dissenting opinion, in which Justices Breyer, Ginsburg, and Sotomayor joined.<sup>26</sup> Justice Stevens was appointed by Gerald Ford (a member of a Republican party very different from today's Republican party); Justices Breyer and Ginsburg were appointed by Democratic President Bill Clinton; Justice Sotomayor was appointed by Democratic President Barack Obama.<sup>27</sup> Thus, the four Justices widely viewed as relatively liberal, three of whom were appointed by Democratic Presidents, voted to uphold the challenged provisions of BCRA and the Court's own precedents. In short, one must strain to see legal objectivity in lieu of political representation.

To make matters worse, the majority gave every appearance of being eager to decide the constitutional issues in this case, that is, of being more interested in extending the First Amendment's protection of corporate political speech than in deciding the conflict between *Citizens United* and the FEC. *Citizens United* waived its facial challenge to the Constitutional validity of § 441(b), and maintained only an "as applied" constitutional challenge, as well as a number of statutory arguments.<sup>28</sup> On a bare record, the majority dispensed with the adequacy of resolving the case on an "as applied" basis, and held that the waiver of the facial challenge did not preclude the Court from deciding the case on that basis, so long as the

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<sup>22</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010).

<sup>23</sup> Justices Scalia and Kennedy were appointed by President Ronald Reagan; Justice Thomas was appointed by President George H.W. Bush; Chief Justice Roberts and Justice Alito were appointed by President George W. Bush. *Biographies of Current Justices of the Supreme Court*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Oct. 10, 2011).

<sup>24</sup> *Citizens United*, 130 S. Ct. at 980 (Thomas, J., concurring).

<sup>25</sup> 5 U.S. (1 Cranch) 137 (1803); see generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

<sup>26</sup> *Citizens United*, 130 S. Ct. at 929–79 (Stevens, J., dissenting).

<sup>27</sup> *Biographies of Current Justices of the Supreme Court*, *supra* note 23.

<sup>28</sup> *Citizens United*, 130 S. Ct. at 892.



plaintiffs did not abandon their underlying claim that the law was unconstitutional.<sup>29</sup> In a similar vein, Citizens United did not challenge *Austin* or *McConnell* until the Supreme Court requested a second argument on the question of whether these cases should be overruled.<sup>30</sup> Nor did the Court make any effort to decide the case on the statutory, as opposed to constitutional, grounds presented by Citizens United.<sup>31</sup> Nor was the majority shy about including in its holding unions and for-profit corporations, even though neither form of organization was before the Court because Citizens United was a non-profit corporation.<sup>32</sup>

As the majority opinion tacitly acknowledges, striking down laws duly enacted by other, democratically elected, branches of government, enthusiastically overruling rather than distinguishing recent precedent, encouraging arguments not offered by the appellant, resurrecting arguments abandoned by the appellant, and generally committing what the dissent calls "procedural dereliction"<sup>33</sup> may raise concerns about the legal, as opposed to political, quality of a judicial decision. The majority opinion spends pages arguing the propriety and even necessity of reaching its broad holdings in this case.<sup>34</sup>

Whatever one thinks about the merits of *Citizens United*, the Court's claim that it had no real alternative to reaching its very broad holdings is implausible.<sup>35</sup> The Supreme Court did not need to grant certiorari in the first place. Moreover, the Court has any number of doctrines with which decisions can be avoided (consider political question, ripeness, and justiciability) and numerous prudential doctrines favoring narrow decisions over broad decisions.<sup>36</sup> Once certiorari was granted, the Court did not have to order the case reargued. Both parties and *amici* provided various ways that the Court could have decided the case in appellant's favor without disturbing precedent or striking down a law reached after a lengthy and intense legislative process.<sup>37</sup> Thus, with regard both to general canons of judicial prudence and

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<sup>29</sup> *Id.* at 892–94.

<sup>30</sup> *Id.* at 893.

<sup>31</sup> *Id.* at 886–917.

<sup>32</sup> *Id.* at 886–87.

<sup>33</sup> *Id.* at 942 (Stevens, J., dissenting).

<sup>34</sup> *Id.* at 886–917.

<sup>35</sup> See *id.* at 936–38 (Stevens, J., dissenting).

<sup>36</sup> The classic citation supporting this proposition is *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring).

<sup>37</sup> *Citizens United*, 130 S. Ct. at 936–38 (Stevens, J., dissenting). The majority opinion goes to great length to demolish Citizens United's case before deciding for Citizens United. *Citizens United*, 130 at 886–917. Evidently, the plaintiff's case had to be destroyed so that the plaintiff could win on grounds broad enough to satisfy the majority.

to the specifics of this case, the *Citizens United* decision appears enthusiastic, perhaps even zealous—politicized. The majority had the votes to achieve its ends, and the facts were serviceable. As the dissent put it: “The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court. Today’s ruling thus strikes at the vitals of *stare decisis* . . . .”<sup>38</sup> In effect, the majority argued that years of legislation and Supreme Court precedents were, on their face, in contradiction with the requirements of the First Amendment—requirements that suddenly had become obvious, as a matter of law, at least to those Justices who had been recently appointed and so had eyes to see.

The sense that the *Citizens United* decision is driven by political concerns grows stronger when attention is paid to the majority’s substantive arguments, many of which turn on striking empirical propositions that were made without any record evidence, perhaps in part because there was a scant record.<sup>39</sup> For example, the Court justified its decision not to decide the case on an as applied basis<sup>40</sup> by arguing that uncertainty about the extent of First Amendment protection in different factual settings might “chill” political speech (in this case, payments) by corporations and others interested in the outcome of elections.<sup>41</sup> According to this logic, as a general rule, courts should try to decide cases in advance and broadly, lest chilling occur—an approach rather alien to the common law tradition. Nor was any support given for the strange claim that corporations would be deterred from their current behavior by a judicial decision upholding current law (if the FEC won) or broadening the scope of behavior permissible to 501(c)(4) institutions (if *Citizens United* won on the grounds they argued). Most strangely, the Court simply ignores the easily documented fact—documented in the legislative history of BCRA and the records of *Austin* and *McConnell*, and evidenced by simply flipping on the television—that campaigns cost enormous amounts of money, and that much of that money comes from corporations.<sup>42</sup> The Court boldly declares what is simply untrue, that corporations are reluctant to engage in political discourse. As this statement is demonstrably false, it cannot be surprising that the Court offers no

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<sup>38</sup> *Id.* at 942 (Stevens, J., dissenting).

<sup>39</sup> The Court rather bizarrely claims that the record in this case is not scant because in another case that considered the facial validity of 441b, *McConnell*, the district court compiled an extensive record. *Id.* at 894. That is, the majority relies on a district court record in another case that upheld the validity of the statute in making its decision—a case that, moreover, the Court overturns.

<sup>40</sup> *Id.* at 916.

<sup>41</sup> *Id.* at 894.

<sup>42</sup> *Id.* at 979 (Stevens, J., dissenting) (“While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.”).

evidence for it. What is surprising is that the Court argues *from* the almost wacky proposition that corporations do not engage in political discourse.

Indeed, the Court grows impassioned:

The censorship we now confront is vast in its reach. The Government has “muffle[d] the voices that best represent the most significant segments of the economy.” And “the electorate [has been] deprived of information, knowledge and opinion vital to its function.” By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.<sup>43</sup>

Apart from being purple prose, this passage is such bad lawyering as to be professionally irresponsible. There is no evidence whatsoever that any speech was “censored,” in either form or content. In this case, *Hillary*<sup>44</sup> was made and distributed, and the question was whether Citizens United could pay for its distribution using funds from its treasury.<sup>45</sup> More generally, the idea that the U.S. electorate has been deprived of corporate points of view is literally fantastic.<sup>46</sup> Only by defining payment as speech (and speech conveys information, right?) can the Court characterize any regulation of how and when and by what sort of organizations such payments are made as “censorship,”<sup>47</sup> which by definition robs the people of politically vital information because it “muffle[s] voices.”<sup>48</sup>

By the Court’s logic, laws regulating direct contributions and prohibiting the military from conducting campaigns (and even engaging in bribery) muffle voices, too, presumably depriving the electorate of information such as the price of a given judge. Recognizing that bribery and other payments within the political realm still may be forbidden, even though such payments may be characterized as speech, the Court is forced to invent rather strange distinctions. So, the Court argues that bribery, or the contribution of money directly to a campaign, may be regulated because it establishes an appearance

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<sup>43</sup> *Id.* at 907 (internal citations omitted).

<sup>44</sup> HILLARY: THE MOVIE (Citizens United Prods. 2008).

<sup>45</sup> See *Citizens United*, 130 S. Ct. at 887–88.

<sup>46</sup> Alexander Polikoff, *So How Did We Get into This Mess? Observations on the Legitimacy of Citizens United*, 105 NW. U. L. REV. COLLOQUY 203, 225 (2011) (“Most breathtaking of all is the way in which Justice Kennedy’s third sentence [the claim that corporate expenditures will not create the appearance of corruption] takes leave of common sense. Recall all those profits of just the top 100 of the Fortune 500 companies, and the ratio of more than six lobbyists for every member of Congress on health care alone. Without a smidjeon of supporting evidence, Justice Kennedy’s third sentence, in effect, asserts that members of Congress will be unaffected by now-credible threats from those and other lobbyists to spend unlimited sums advertising against their reelection.”).

<sup>47</sup> *Citizens United*, 130 S. Ct. at 907–08.

<sup>48</sup> *Id.* at 907.

of corruption. But massive expenditures on behalf of a candidate may not be regulated because there is no “quid pro quo.”<sup>49</sup> Evidently, the majority believes that government officials feel obligated to repay contributions and bribes, but not expenditures and presumably other favors. The Court also seems to believe that none of this creates even the appearance of corruption.<sup>50</sup> Where the evidence for these propositions is, the Court does not say. Similarly, the Court acknowledges that the law may prohibit members of the government from engaging in political activity because there is a political interest in doing so,<sup>51</sup> which no doubt is true—just as there is a political interest in regulating the influence of corporate money in campaigns. Again and again, the Court draws lines, but without providing a convincing rationale of why the lines are where they are, apart from the obvious fact that this placement means the case comes out in the preferred fashion, i.e., corporate participation in elections is unregulated.

One could easily go on to cite instances of the Court seeming to proclaim political preferences rather than make relatively objective legal judgments, but for present purposes, there is no need. The issue here is not whether this or that argument is tenable. The point is that the reception of a judicial opinion, like that of any text, is a delicate matter. A parade of implausible arguments, bald assertions contrary to common experience, and simple unawareness or blatant disregard of the concerns traditional in legal discourse, leads the reader to suspect that these arguments are either incompetent, or more likely, not seriously meant to be persuasive. Such a reader may adopt a skeptical, even cynical, stance.<sup>52</sup>

Justice Stevens wrote a lengthy opinion, joined by Justices Ginsburg, Breyer, and Sotomayor, dissenting in large part, albeit concurring in the decision to preserve certain BCRA disclosure requirements.<sup>53</sup> As he faced retirement, Justice Stevens worried about the Court: “The path it has taken to reach its outcome will, I fear, do damage to this institution.”<sup>54</sup> In *Citizens*

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<sup>49</sup> *Id.* at 901–02.

<sup>50</sup> *Id.* at 908.

<sup>51</sup> *Id.* at 904.

<sup>52</sup> Cynicism within the legal profession about the law, or at least the Supreme Court, is likely to be suppressed by aspiring academics and other ambitious lawyers. So law review articles are still written, arguments made, but much of this is on a pro forma basis—which is hardly healthy. See *The Colbert Report* for political comedian Stephen Colbert’s criticism of Justice Thomas and the *Citizens United* decision. (Comedy Central television broadcast Feb. 17, 2011), available at <http://www.colbertnation.com/the-colbert-report-videos/374633/february-17-2011/jeffrey-leonard>.

<sup>53</sup> “Wrote” is meant literally. Justice Stevens, rather than his law clerks, drafts his own opinions. ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 222–23 (2006).

<sup>54</sup> *Citizens United*, 130 S. Ct. at 931 (Stevens, J., dissenting).

*United*, Justice Stevens thus found himself with the same institutional concerns, and in the same dissenting position, he had held a few years earlier, in the case of *Bush v. Gore*.<sup>55</sup> In dissent in that case, Justice Stevens wrote: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."<sup>56</sup>

*Citizens United* soon became "political" in the ordinary partisan sense of the word. In the President's annual State of the Union Address, which is attended in person by the Justices, President Obama criticized the Court's decision.<sup>57</sup> Using the bully pulpit,<sup>58</sup> the President appealed directly to the other explicitly political branch, Congress, for help in correcting the Court's substantive errors. The Justices were visibly taken aback: Justice Alito mouthed "not true."<sup>59</sup> This was more than a little disturbing. The judiciary, after all, is supposed to be somewhat above politics. The Court's authority rests on this society's respect for law and belief that cases are decided on the basis of law, objectively, not on the basis of political preference, subjectively. Or so it has long been believed.

But what if the citizenry loses its "confidence in the judge as an impartial guardian of the rule of law?"<sup>60</sup> What are citizens to believe that judges do? Presumably, judges still protect the social order, but in the absence of faith in the rule of law, the social order is apt to be seen as subjective, partial, and inevitably unequal. A society in which the citizens believe themselves to be as unequal before the law as they are in social and economic fact cannot be called a republic.

### *B. Difficulties for Theory*

It may be difficult for the professoriate to think jurisprudentially about what considering the Court to be "political" might mean. In some sense, the

<sup>55</sup> *Bush v. Gore*, was another 5-4, conservative vs. liberal, count hands decision, which not incidentally decided the presidential election of 2000 in favor of George W. Bush. 531 U.S. 98 (2000).

<sup>56</sup> *Id.* at 128-29 (Stevens, J., dissenting).

<sup>57</sup> Darlene Superville, *Obama Weekly Address VIDEO: President Blasts Supreme Court over Citizens United Decision*, HUFFPOST POLITICS (Jan. 23, 2010, 08:35 AM), [http://www.huffingtonpost.com/2010/01/23/obama-weekly-address-vide\\_n\\_434082.html](http://www.huffingtonpost.com/2010/01/23/obama-weekly-address-vide_n_434082.html).

<sup>58</sup> "Bully pulpit" is a term attributed to Theodore Roosevelt and refers to the President's power to advocate for a particular agenda. See generally JAMES M. STROCK, *THEODORE ROOSEVELT ON LEADERSHIP: EXECUTIVE LESSONS FROM THE BULLY PULPIT* (2003).

<sup>59</sup> David Kirkpatrick, *White House v. the Supreme Court*, THE CAUCUS (Jan. 28, 2010, 2:11 PM), <http://thecaucus.blogs.nytimes.com/2010/01/28/white-house-v-the-supreme-court/?scp=3&sq=alito+not+true&st=nyt>.

<sup>60</sup> *Bush*, 531 U.S. at 129.

Court has always been “political.” Courts are political institutions. Courts are inhabited by people, and man, said Aristotle, is a political animal.<sup>61</sup> Generations of “realist” and then “critical” legal scholars have argued that the idea that “law” can be understood in isolation from “politics” is an illusion, and oftentimes a lie, told for ignoble purposes. Surely Justice Stevens and the host of academics who oppose the decision know these things, so what does it mean to say that *this* case is unacceptably political? Just as there is a sense that *Citizens United* says something importantly new about the perennial problem of money in democratic politics, there is a widespread sense that this case is newly, and wrongly, political. It may be impossible to state precisely where the line is, but for many commentators, including Justice Stevens and the other dissenters, *Citizens United* crossed it.

Although the relationship between “law” and “politics” cannot be stated with any finality, it seems clear that law must always exist in some relation to politics, that is, law is distinct from, but not removed from, politics. So, in U.S. jurisprudence, the majority decision in *Lochner v. New York*<sup>62</sup> stands for the proposition that an extreme disjunction between law and politics can lead judges to make decisions that are not responsive to society and are therefore unwise. More fundamentally, decisions that do not express a society’s deeper convictions cannot claim to be that society’s law.

On the other hand, although law must be responsive to politics, few if any critical legal scholars would argue that courts and legislatures, law and politics, are simply equivalent. Courts do not pursue the same ends as legislatures, do not have the same methods or pressures as legislatures, and are not legitimated in the same ways as legislatures. Few scholars would dispense with the idea that the judiciary should be in some important sense independent of both the executive and the legislative branches, and should make decisions on some relatively objective, professional basis that we might recognize as legal as opposed to political. The law/politics divide is dead, but it rules us from the grave.<sup>63</sup>

The majority opinion just does not seem to be serious about *law*, at least in the rationalistic sense that law professors use the word. The sheer sloppiness of the Court’s opinion, drafted and signed onto by demonstrably intelligent people, indicates that the opinion is an exercise, merely going

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<sup>61</sup> ARISTOTLE, THE POLITICS 9 (T.E. Page et al. eds., H. Rackham trans., G. P. Putnam’s Sons 1932) (c. 350 B.C.E.).

<sup>62</sup> 198 U.S. 45, 52–65 (1905).

<sup>63</sup> F. W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 1 (A.H. Chaytor & W.J. Whittaker eds., Cambridge Univ. Press 1936) (1909) (“The forms of action we have buried, but they still rule us from their graves.”).

through the motions.<sup>64</sup> The majority presumably has reasons for deciding this case in the way that it did, but the scholar may find herself unable to keep believing that the opinion is a good faith explanation of those reasons, presumably because the decision is not, at bottom, legal in character. *Citizens United* thus sets forth the conditions for an intellectual rupture, a before and after, for the U.S. legal academy. If the rupture is felt among a sufficient portion of the tradition's adherents, then one may speak of a tradition in crisis.

Whether, as a matter of intellectual sociology or history, the crisis will eventuate and the faith will be lost remains to be seen. In the abstract, however, the structure of the crisis is quite straightforward. Just suppose that a significant number, perhaps most, legal scholars come to believe that the *Citizens United* decision is essentially political in nature, that the decision was reached by counting votes on the bench, not according to the strength of arguments made at the Court. What are legal scholars to do if this is in fact the position in which they find themselves? As already suggested, it seems silly to continue "legal" argument about the cases before the Supreme Court if the Court has already moved on to doing something else, something that (old-fashioned) argument does not address. If legal scholars come to believe that law does not matter much to courts, then how are professors and those who want to become professors to write law review articles about court cases?

Perhaps legal argument might be considered a self-sufficient and high-minded activity, like competitive debate or chamber music, but a fair portion of the professoriate has traditionally believed that it was responding to the actual practices of powerful institutions, and that on very good days, the institutions might listen. It is difficult to imagine contemporary legal scholarship carried forth for its own sake. In comparison with other forms of expression, law review articles are simply insufficiently beautiful, true, or entertaining.

Another possibility would be to take an objective ("empirical") stance toward the Supreme Court.<sup>65</sup> Indeed the impulse to treat law, which is clearly an academic discipline concerned with society, as a species of social science has, in one form or another, run through the U.S. legal tradition since Langdell. But law never becomes a social science; the legal academy always pulls back from reinventing itself as a branch of the sociology or economics

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<sup>64</sup> "‘Intellectually irresponsible,’ then, remains a fair characterization of Justice Kennedy’s opinion.” Polikoff, *supra* note 46, at 225.

<sup>65</sup> See, e.g., David S. Law & Davie Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653 (2010).

departments.<sup>66</sup> There is no obvious reason to believe that this time will be any different.

A different approach would be to admit that this particular case, *Citizens United*, is indeed an exercise in politics rather than law. From the perspective of the legal academy, therefore, *Citizens United* is an outlier that should be ignored as a professional, methodological matter, thereby neutralizing its threat to the discipline. One swallow does not a summer make, and the existence of a few nakedly political cases, like *Citizens United* or *Bush v. Gore*,<sup>67</sup> does not mean that law, as distinct from politics or ideology, does not govern an enormous number of important social situations. And in such situations, lawyers (including legal scholars) have something important to say. Legal scholarship could, in theory, abandon the Supreme Court, at least with regard to this case. This seems unlikely, especially in light of the structures of prestige that link the Court to the legal academy.<sup>68</sup> And, more substantively, dismissing *Citizens United* as an anomalous triumph of politics over law would leave scholars with nothing to say about *Citizens United*. And the case, to say nothing of the issue it addresses—money in American politics—seems too vitally important to be ignored.

Scholars have handled the un-legal quality of *Citizens United* by reasserting the authority of their discipline and railing against the case as badly decided, arguing that the majority is wrong as a matter of law.<sup>69</sup> In this view, *Citizens United* is important and should be argued over, but is not significant for the discipline because it is simply (or not so simply) a mistake.<sup>70</sup> The Court erred, and in the fullness of time, the legal tradition will rectify its errors. Or so it may be believed. In a related move, scholars have responded to *Citizens United* by turning to other areas of law, such as corporation law<sup>71</sup> or securities law, and arguing that appropriate reforms in such areas could remedy, or at least ameliorate, the damage done by *Citizens United*.<sup>72</sup>

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<sup>66</sup> See generally JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (Univ. of N.C. Press 1995).

<sup>67</sup> 531 U.S. 98 (2000).

<sup>68</sup> That said, my impression is that Supreme Court discourse has lost some of its prestige in the last few decades—legal scholarship does not seem as dominated by Articles parsing the Court as it once was.

<sup>69</sup> Of course some scholars jump the other way and defend the Court's decision in *Citizens United*. See, e.g., Eugene Volokh, *The Chief Beneficiaries of Citizens United?*, THE VOLOKH CONSPIRACY (Mar. 15, 2010, 7:45 PM), <http://volokh.com/2010/03/15/the-chief-beneficiaries-of-citizens-united>. I suppose this is meant to suggest originality and independence of thought.

<sup>70</sup> See, e.g., Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. 953, 954–55 (2011).

<sup>71</sup> See, e.g., Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010); Yosifon, *supra* note 18.

<sup>72</sup> See, e.g., Abrams, *supra* note 16; Michael R. Siebecker, *Trust & Transparency: Promoting Efficient Corporate Disclosure Through Fiduciary-Based Discourse*, 87 WASH. U. L. REV. 115 (2009).



The difficulty with such approaches to *Citizens United* is their implausibility and hence forced quality, which undercut their effectiveness. To respond to *Citizens United*, of all cases, with a tight argument about an alleged necessity for widespread reforms in constitutional jurisprudence, or some doctrinally distinct area of the law, is a quixotic exercise that maybe only a law professor could love.<sup>73</sup> It is certainly true that, reasoning from the U.S. legal tradition in the fashion we expect of judges, the Supreme Court answered the question posed by *Citizens United* about federal election law incorrectly, i.e., the scholar would have answered the questions posed by the case differently, if she had been a Justice. But so what? The Court has made it gin clear that neither the niceties of professorial argument nor even facts pose serious obstacles to its decisions. To think otherwise is to misunderstand. The *Citizens United* majority is not “wrong.” As the old joke has it, “We’re not the Supreme Court because we’re right. We’re right because we’re the Supreme Court.”<sup>74</sup> *Citizens United* is the law of the land, at least for now, and is, as a matter of law, “right.”

While devaluing, if not precluding, a certain kind of scholarship—the kind of scholarship that has traditionally dominated law journals—the belief that the Supreme Court is not all that serious about legal argument need not be an intellectual nor even a professional calamity. Legal scholarship might proceed by entertaining the consequences of the idea that *Citizens United* is in fact a “political” decision. In that case, it may be asked, without embarrassment, *what is the nature of the politics at issue?*<sup>75</sup> Rephrased, to say that “law is politics,”<sup>76</sup> as was famously said in another era, is also to say that “politics is law”<sup>77</sup>—so what are the politics here, and hence for the time being, what is our law?<sup>78</sup> To put the question in terms of cultural

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<sup>73</sup> See David A. Westbrook, *Pierre Schlag, the Critique of Normativity, and the Enchantment of Reason: Pierre Schlag and the Temple of Boredom*, 57 U. MIAMI L. REV. 649, 660 (2003).

<sup>74</sup> This joke has been attributed to numerous sources. As one variation of it reads, “We are not final because we are infallible, but we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

<sup>75</sup> Academics of a certain caste could, of course, go a step further, and consider the decision as if it might be essentially a natural phenomenon to be measured—a proper topic for political science—as opposed to a legal or intellectual matter to be argued. The question, then, would be to determine whether the decision was best understood in terms of “law” or of “ideology.” See, e.g., Law & Zaring, *supra* note 65, at 1658 (concluding that the legal reasons are predominant).

<sup>76</sup> John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 411 (1984).

<sup>77</sup> My friend Jack Schlegel has also said that “politics is law” to me and others.

<sup>78</sup> Whatever its weaknesses as an idea of politics writ large, Schmitt’s idea of the exception—sovereign is he who has the ability to declare the exception to the law—has trenchancy here. See generally Carl Schmitt, *THE CONCEPT OF THE POLITICAL* (George Schwab trans., Univ. of Chi. Press 2007) (1932). Given the opposition between law and politics in Schmitt’s schema, the judiciary does not declare the emergency and hence the state of exception. Without declaring a state of emergency (but see the “vast” censorship, *supra* note 43) the Supreme

anthropology: what is the imagination through which the *Citizens United* decision makes sense?<sup>79</sup>

Abandoning the idea that the Court takes legal argument seriously may work intellectually and even professionally, but it comes at considerable cost. Politically, if legal argument does not matter, then there is little reason to see the law as constraining, rather than expressing, social power. The scholar who sought to influence and participate in legal discourse is forced to recognize herself as an observer, a spectator rather than a player. If legal scholars are spectators, then citizens who are not lawyers do not even have tickets, unless they have some other source of authority such as wealth or office. Such law is alien rather than republican.

### III. POLITICAL ECONOMIES

#### *A. The Political Imagination of the Citizens United Court*

To start from familiar ground: *Citizens United* is widely considered a “conservative” decision, through which the majority seeks to limit the power of the state to regulate the political expressions of private actors. Phrased more negatively, the conservative wing of the Court is unconcerned about the power of private actors (corporations) to exercise undue influence over elections and thus government. The *Citizens United* decision has been opposed on “liberal” or “progressive” grounds, by people who are worried that concentrations of wealth may subvert democratic governance (worried that corporations can buy influence), and who therefore support legal restrictions on campaign expenditures by corporations.<sup>80</sup> To generalize, the Court’s majority takes the view that democracy is imperiled by the efforts of the state to protect itself from criticism. In contrast, the dissent believes that the aggregation of “private” power poses a more serious threat.

The conservative and liberal positions, the right and the left, are reciprocal, and therefore share a structure. Both of these perspectives imagine the social and political world in terms of familiar oppositions: state/individual, sovereign/society, government/market, left/right,

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Court has at various times taken substantial exception to the legal traditions of the United States, perhaps most famously in *Brown v. Board of Education*. 347 U.S. 483 (1954). The Court tends to deny the significance of its actions. For example, in this case, the majority actually trots out an originalist understanding of “speech,” as if the Founders intended modern corporations to make electioneering films and pay for their distribution on cable television. *Citizens United v. FEC*, 130 S. Ct. 876, 898–90 (2010). The judiciary is thus a sovereign in denial.

<sup>79</sup> See WESTBROOK, *supra* note 13, at 129–36.

<sup>80</sup> See, e.g., Vicki C. Jackson, *Democracy and Judicial Review, Will and Reason, Amendment and Interpretation: A Review of Barry Friedman’s THE WILL OF THE PEOPLE*, 13 U. PA. J. CONST. L. 413, 442 (2010).

liberal/conservative. This structure is venerable and runs in the American constitutional tradition, back through Locke and at least to Hobbes, who imagined the sovereign standing over and against a relatively unruly private life, a marketplace.<sup>81</sup> In short, this structural opposition between the government and the market appears in both the *Citizens United* decision and in the criticism of that decision, because it is the way we traditionally frame such questions. As discussed below, although entailed in contemporary First Amendment jurisprudence, this imagination of our society is too primitive for legal articulation of traditional American understandings of public life.

### *B. The Economic Imagination of the Citizens United Court*

In over a hundred pages, the five opinions in *Citizens United* devote very little attention to what the case might mean for markets, i.e., places where things are bought and sold. When the Court's attention does turn to markets, the issue is usually the effect of economic power on the "marketplace of ideas," that is, on electoral processes. The opinions are concerned with: What does this or that expenditure of corporate money mean for the conduct of political campaigns? Does money spent in that fashion serve to justify a particular regulation, such as BCRA § 203 over electioneering speech, in light of the First Amendment's solicitude for political speech? But while asking about the influence of markets on elections, the Court pays almost no attention to the reverse, the influence of electoral politics—government power—on the soundness of markets, and our confidence that we are not living in a corrupt economy. For the *Citizens United* Court, markets as such are not really at issue.

In the same vein, at several junctures in the opinions attention is paid to marketplace actors, notably shareholders and their corporations that are almost always conceived as if they were voters, whose votes should not be coerced or distorted.<sup>82</sup> That is, shareholders and corporations as such are not considered by the *Citizens United* decision. Nor are payments, speech, or competition considered in terms of the grammar of markets, as opposed to the grammar of elections.

It is thus only with difficulty and some uncertainty that the Court's understanding of markets can be articulated. Treading lightly, however, a few things can be said, particularly since the majority's image of the society

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<sup>81</sup> See, e.g., THOMAS HOBBS, LEVIATHAN 124–25 (Edwin Curly ed., Hackett Pub. Co. 1994) (1651); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 15 (Lewis F. Abbot trans., Indus. Sys. Research 2009) (1689).

<sup>82</sup> An exception is Justice Stevens talking about rent-seeking *en passant*. *Citizens United v. FEC*, 130 S. Ct. 876, 975, 977 (2010) (Stevens, J., dissenting).

that must accept its rulings is hardly original, essentially an expansion of the political imagination philosophically articulated by Locke and Hobbes to legitimate the state. In this imagination, people come together to form a commonwealth, headed by a sovereign. Once formed, however, the sovereign must be regarded as distinct from, and often opposed to, society. The sovereign has power, perhaps absolute power; the sovereign is leviathan in its enormity, as Hobbes has it.<sup>83</sup>

It is the function of law to restrain the sovereign. So taught Locke.<sup>84</sup> And in the United States, it is the office of the judiciary to apply the law to the government, to keep Leviathan from abusing its power.<sup>85</sup> The law, in this view, heroically opposes the possibility of tyranny.<sup>86</sup> Why, without the judiciary, the *Citizens United* Court excitedly exclaimed, the government might ban *Mr. Smith Goes to Washington*.<sup>87</sup> Markets fit into this scheme mostly by implication: because the judiciary's duty is the limitation of sovereign power, the eyes of the judge are on the other branches of government.

Broadly speaking, the law restrains the rest of government through the enforcement of rights, conceived as liberties that the state may not restrict or take away as a matter of mere political will, and without appropriate ("due") legal (here especially opposed to "political") process.<sup>88</sup> Among the rights used to restrain government, however, the First Amendment holds a special place, because it protects activities at the heart of self-governance, and so the legitimacy of the government writ large. Specifically, First Amendment jurisprudence, built on the text that "Congress shall make no law . . . abridging the freedom of speech,"<sup>89</sup> proposes to constrain government through the dissemination of information, for elections and other matters of public concern. Congress can make no law keeping people from talking because talk among the people, and hence information, is necessary for people to elect good representatives and thus to govern themselves.

All this is familiar. For present purposes, however, what is significant is that the constitutional prohibition on restricting the freedom of speech implies some positive idea of civil society, outside the government, whose members *form* the government. Rephrased, "civil society" is the ground from

<sup>83</sup> Hence the title of "Leviathan." HOBBS, *supra* note 81.

<sup>84</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 188 (Hafner Press 1970) (1689).

<sup>85</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–77 (1803).

<sup>86</sup> For one depiction, see generally ROBERT BOLT, A MAN FOR ALL SEASONS (1962).

<sup>87</sup> *Citizens United*, 130 S. Ct. at 916–17; *MR. SMITH GOES TO WASHINGTON* (Columbia Pictures Corp. 1939).

<sup>88</sup> See U.S. CONST. amend. V.

<sup>89</sup> U.S. CONST. amend. I.

which government springs and the terrain on which government operates. Civil society is thus the context or field in which government lives.

In limiting the exercise of government power, First Amendment jurisprudence leaves the field of such exercise, civil society, undefined. Specifically, First Amendment cases ask the Court to decide whether a given government action is legal. If the government takes action “abridging the freedom of speech,” then the action cannot be legal because the First Amendment prohibits government from taking such an action. First Amendment jurisprudence is thus focused on government action, but implies a civil society “out there.” First Amendment jurisprudence, however, makes no effort to articulate how that society governs itself apart from the legislative functions of the government, and what that society’s weaknesses might be. The law worries about the sovereign overstepping its bounds; the social world that constructs the sovereign, and that the sovereign rules, is otherwise left to take care of itself.

The brief discussions of economic life in *Citizens United* are distressing because the Court seems to have no idea how civil society in the United States, and especially U.S. markets, actually works, and even more surprisingly, no sense of the ways in which the government works in various markets. The short passages in the *Citizens United* opinion that actually treat markets read as if written for another time and place, as if in translation. However, at least four aspects of the way the Court understands contemporary U.S. markets do emerge:

First, the existence of markets, and their fundamental independence from the state, is assumed. This is a peculiar assumption in light of the nation’s recent history. The financial crisis has made it unpleasantly obvious that there is hardly a gulf between the operation of our markets and our government.<sup>90</sup> In particular, the financial crisis has made it clear that even a very *laissez faire* administration will intervene in markets, with tax dollars, when confronted with systemic risk. Moreover, massive “public” efforts will be made to restart “private” markets that have collapsed, including mortgage securitization and commercial credit. And almost nobody in the United States believes the federal government ought to be in the business of making cars, or even evaluating corporate debt. In the United States, market actors rely on the federal government to get them out of trouble. And the federal government believes in business, and therefore constructs markets when necessary. For present purposes, the financial crisis teaches that functioning markets can neither be assumed nor thought independently of government.

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<sup>90</sup> See generally WESTBROOK, *supra* note 14.

Second, the Court is uninterested in the structure of markets. This is generally, if crudely, expressed by saying that the inequality of market participants does not matter, and by forbidding the government to employ an “antidistortion” rationale for regulating electioneering communication.<sup>91</sup> But of course, the inequality of position matters a great deal in market interactions, and especially in corporate governance, which is at issue in *Citizens United*. For example, a shareholder with enough shares controls the corporation, and hence takeover battles. More generally, structure matters.<sup>92</sup> Since before Berle and Means wrote in the 1930s, corporation law has been worried about the relationships among shareholders and managers.<sup>93</sup> Entire fields of law—consider antitrust, banking, contract, government contracting, property (especially intellectual property) and securities law—are concerned with the structure of markets.

Third, transparency exists and can be relied upon. The idea of political information on which so much First Amendment jurisprudence rests is strikingly unarticulated. This is intentional. More speech is better, but the Court explicitly refuses to concern itself with what is said: “[t]hose choices and assessments, however, are not for the Government to make.”<sup>94</sup> But society’s access to information is hardly a given. In financial markets, the principal thrust of securities law is to ensure that quality information is available to the markets. This is no small task. The financial crisis, to say nothing of Enron and the accounting scandals that led to the Sarbanes-Oxley Act of 2002,<sup>95</sup> made it very clear that market actors often do not have information, and when they do have information, it is often because of a mandatory disclosure regime. And after the faulty and manipulated information used to make the case for entering the Second Gulf War, to say nothing of problems with torture, rendition, habeas corpus, and the like, it seems bizarre to assume that vital information about either companies or candidates is simply available. Transparency requires much more than government non-interference; it often requires regulation. It is thus unsettling when the Court strikes down a regulation designed to secure the quality of information and blandly presumes that “transparency enables the electorate

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<sup>91</sup> See *Citizens United*, 130 S. Ct. at 903–09.

<sup>92</sup> See DAVID A. WESTBROOK, *BETWEEN CITIZEN AND STATE: AN INTRODUCTION TO THE CORPORATION* (2007).

<sup>93</sup> See ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (William S. Hein & Co. reprinted ed. 1982) (1933); see also Eric Hilt, *When Did Ownership Separate from Control? Corporate Governance in the Early Nineteenth Century*, 68 J. ECON. HIST. 645 (2008).

<sup>94</sup> *Citizens United*, 130 S. Ct. at 917.

<sup>95</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

to make informed decisions and give proper weight to different speakers and messages.”<sup>96</sup>

Lastly, corporate governance works. “Shareholder objections raised through the procedures of corporate democracy can be more effective today because modern technology makes disclosures rapid and informative.”<sup>97</sup> Again, the brazenness of such statements indicates a lack of seriousness. The experience of the last few years is that corporate governance very often does not work. Companies like Enron and WorldCom lied and then imploded.<sup>98</sup> The Disney litigation, over the basic competence of its board of directors, dragged on for years, before eventually arriving at a desultory conclusion.<sup>99</sup> Investment houses that had survived for over a century collapsed.<sup>100</sup> After the painful fiascos of the last few years, it is difficult not to believe that the Court’s position on corporate governance is simply disingenuous. Nobody could regularly read a major paper written recently and think that informational systems are working well and therefore companies and officials in the United States are disciplined by a well-informed and attentive group of shareholder citizens, who keep a firm hand on the tillers of the institutions in question. We have the employment and growth rates, and the entailed pain, to prove otherwise.

### C. A Dualist Vision of Society

The *Citizens United* opinion imagines American society to have two basic socio-political contexts, the state and civil society. The state, including its judges, governs. The state is periodically created through elections, and thereby legitimated by the people in civil society. As already suggested, this is a reductive version of social contract theory, and as such, familiar.

Whatever merits the idea of a social contract may have for thinking about the legitimacy of the state and its laws, i.e., explaining the bounds of freedom, such a dualist account of society does not describe our institutions,

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<sup>96</sup> *Id.* at 916.

<sup>97</sup> *Id.* (citation omitted).

<sup>98</sup> See WILLIAM C. POWERS, JR. ET AL., REPORT OF INVESTIGATION BY THE SPECIAL INVESTIGATIVE COMMITTEE OF THE BOARD OF DIRECTORS OF ENRON CORP. (2002); KURT EICHENWALD, CONSPIRACY OF FOOLS (2005); BOB LYKE & MARK JICKLING, CONG. RESEARCH SERV., RS 21253, WORLD.COM: THE ACCOUNTING SCANDAL (2002); BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (2003).

<sup>99</sup> See *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 697 (Del. Ch. 2005), *aff’d*, 906 A.2d 27 (Del. 2006); Carolyn Berger, *Good Faith After Disney: Justice Berger’s Closing Discussion*, 55 N.Y.L. SCH. L. REV. 659, 661 (2010/2011).

<sup>100</sup> See, e.g., LAWRENCE G. McDONALD & PATRICK ROBINSON, A COLOSSAL FAILURE OF COMMON SENSE: THE INSIDE STORY OF THE COLLAPSE OF LEHMAN BROTHERS (2009).

even our governmental institutions, and hence fails to articulate much that is critical to social life. In the situation that *Citizens United*, as Plaintiff, brought before the Court, three fundamentally different modes of political choice were at issue: elections, courts, and markets—that is, politics, law, and economics.<sup>101</sup> Three importantly different concepts cannot fit into two boxes without distortion, and much of the sheer awkwardness of the *Citizens United* opinion stems from the Court's effort to do so.

However, the majority's dualistic perspective does much to explain the widely criticized "political" character of the Court's decision.<sup>102</sup> It is clear that courts are a part of government: the part of government that serves to brake the potentially tyrannical ambitions of the more active branches.<sup>103</sup> So of course the exercise of judicial power is political, and more specifically, the opinion of a hard-won bipartisan consensus in Congress (hence "McCain-Feingold") does not count for much—throughout the *Citizens United* opinion, the Court simply does not defer to the judgment of Congress.

The explicit command of the First Amendment, "Congress shall make no law . . . abridging the freedom of speech,"<sup>104</sup> is taken to mean that the legislative power of the state cannot be used to shape discourse within civil society. The two spheres must be kept distinct. In particular, government cannot use its power to shape elections, that is, how civil society constitutes government. The First Amendment itself thus not only directly expresses, but also is used by, the Roberts Court to constitute a dualistic vision of the American polity.

Consider especially the Court's central argument for overturning BCRA, *McConnell* and *Austin*. The Court begins from the uncontroversial proposition that the First Amendment guarantees freedom of speech, and specifically, that members of society have the right to speak out come election time.<sup>105</sup> From this, the Court takes a giant leap, with a winsome echo of Equal Protection law, arguing that Congress may not restrict speech based on the identity of the speaker.<sup>106</sup> From this proposition, the Court reasons that corporations are legal persons, members of society, and therefore have the

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<sup>101</sup> See *infra* Part III.D.

<sup>102</sup> See *supra* note 19 and accompanying text.

<sup>103</sup> Courts tend to believe that they themselves pose little danger of tyranny. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

<sup>104</sup> U.S. CONST. amend. I.

<sup>105</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.").

<sup>106</sup> *Id.* at 898–99. For a discussion of First Amendment jurisprudence in equal protection terms, see Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010).



right to speak.<sup>107</sup> Because they have the right to speak politically, corporations have the right to make unlimited campaign expenditures, and Citizens United cannot be prohibited from paying for the distribution of *Hillary*. QED.<sup>108</sup>

So stated, the merits of this case seem really quite simple, and much of the sparring among the opinions is superfluous. If “civil society” is an undifferentiated mass, then confusing distinctions among various forms of association (political action committees, § 501(c)(3), § 501(c)(4), § 501(c)(6), and § 527 organizations, unions, C-corporations, “media corporations,” and even “the press” referred to in the Constitution) are completely irrelevant. Members of civil society have the right to speak on matters pertaining to elections, society has the right to hear the speech, and elected officials cannot do anything to influence the speech. None of this is very complicated, or so the Court argues. Again, the structure of this society is not really the Court’s concern.

The Court does acknowledge a substantial difficulty: the law does restrict the speech of certain speakers based on their identity, and the Supreme Court has upheld such restrictions.<sup>109</sup> The law routinely restricts the First Amendment rights of prisoners,<sup>110</sup> soldiers,<sup>111</sup> members of government,<sup>112</sup> and students.<sup>113</sup> These cases are different, the Court maintains, because of the “interest in allowing governmental entities to perform their functions,”<sup>114</sup> and because there are “certain governmental functions that cannot operate without some restrictions on particular kinds of speech.”<sup>115</sup>

Here again, the *Citizens United* Court splits the world in two and does so at the same place: the line between government and civil society. In the governmental realm, e.g., prisons, speech may be regulated based on the identity of the speaker. In civil society, speech may not be so regulated. The Court provides no authority for declaring a class of “government” First Amendment cases, but bracketing such quibbles, on what side of the line

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<sup>107</sup> *Id.* at 899.

<sup>108</sup> This extremely simple and explicitly syllogistic construction of *Citizens United* is the best justification of the majority opinion of which I am aware. See Dan Schweitzer, *Musings on Citizens United: An Appellate Advocate’s Perspective*, NAAGAZETTE, April 2010, at 4.

<sup>109</sup> *Citizens United*, 130 S. Ct. at 899. My argument at this juncture owes a debt to Polikoff, *supra* note 46, at 205.

<sup>110</sup> See *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 131–32 (1977).

<sup>111</sup> See *Parker v. Levy*, 417 U.S. 733, 758–59 (1974).

<sup>112</sup> See *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 566–68 (1973).

<sup>113</sup> See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

<sup>114</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

<sup>115</sup> *Id.*

does campaign speech go? The *Citizens United* Court's dualism means that campaign speech has to go on one side of the line between the government and civil society, or the other—there is no middle ground. So framed, the question is not hard: campaign speech is an act of civil society. “The corporate [election speech] at issue in this case, however, would not interfere with governmental functions . . . .”<sup>116</sup> In fact, “[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.”<sup>117</sup>

Whether this proposition is true is highly controversial.<sup>118</sup> For present purposes, however, the point is to highlight the dualism that structures the Court's reasoning. Having bifurcated the world between civil society and government, it is hardly crazy to suggest that election speech belongs to the realm of civil society. Campaign speech is an act of civil society; elections are how civil society chooses its rulers. Elections are not an aspect of government; they are prior to government. As a corollary, elections are a function of civil society, which means, at least in a commercial society like the United States, elections are largely markets.

Three consequences of the Court's dualism are noteworthy. First, as noted, the structure of First Amendment discourse leaves civil society undefined. Civil society is the terrain that government (and law) rules; civil society is the womb from which (democratic) government, and hence law, springs. Civil society is potential, and consequently undifferentiated. It is therefore unsurprising that the *Citizens United* Court has no sense of actual markets, even if the field of discourse that obtains prior to an election is traditionally called a “marketplace of ideas.”<sup>119</sup> In particular, the fact that the *Citizens United* Court does not consider whether forms of business association might define both the speaker and the content of the speech, as noted above and discussed at length below, becomes logical, if hardly wise.<sup>120</sup> *Citizens United's* silence on institutional matters is not incidental; this silence seems hardly awkward in the context of the Court's analysis.

By the same token, the Court does not distinguish between speech and payment, the modes of interaction within civil society, accidentally rendering

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 910.

<sup>118</sup> The Court provides literally no evidence for the proposition. The U.S. Congress, prior Supreme Courts, and others have thought that massive campaign expenditures create an appearance of corruption, and that appearance interferes with government functions by undermining government legitimacy. See *id.* at 961–68 (Stevens, J., dissenting) (noting Congressional findings to the contrary); Polikoff, *supra* note 46, at 219–20.

<sup>119</sup> See, e.g., *Citizens United*, 130 S. Ct. at 906.

<sup>120</sup> So, for example, the Court argues that because the speech of media corporations cannot be regulated, the speech of no business association can be regulated. *Id.* at 905–06.

the ancient prohibition of bribery rather inexplicable. In order to preserve the idea that bribery may be prohibited, the Court is forced to claim the existence of a vast difference between “expenditure” on behalf of a candidate, and “contribution” to the candidate.<sup>121</sup> More generally, without distinctions within civil society between speaking and paying, the Court has no conceptual ground on which to limit the use of money. It appears to the Court that, at least if intended to have a political function, payments and other interactions within civil society must be deemed speech to be protected from Leviathan, which has some ridiculous but logical consequences, such as the proposition that bribery ought to be legalized. In response to bribery, as with regard to speakers whose speech rights are legally restricted, the Court is forced to improvise, with less than convincing results. In short, the Court’s First Amendment dualism causes it to declare civil society off limits to serious judicial consideration, and so its ruling appears, if not arbitrary, hardly well-founded.

A second aspect of the Court’s dualism is worth noting here: former Justice Sandra Day O’Connor, the author of the Court’s opinion in *Austin*, is entirely correct to be worried that *Citizens United* threatens to make judgeships a commodity, available for purchase.<sup>122</sup> From the Court’s view, civil society periodically resigns the social contract and constitutes government. “Speech”—now understood to be largely if not exclusively the spending of money—is how the Constitution refers to this process of building a governing consensus. Judges are indubitably part of the government, and in much of the United States, are elected. And so it would seem to follow, as a corollary of the *Citizens United* opinion, that judges, like senators, receive their positions through the expression of capital. Why should the judiciary be different from the legislative or executive branches in this regard? Civil society constitutes government, and the dominant language of civil society is payment. It follows that payment should determine who our officials are, why not include judges?

Thus, third and most critically, the dualism of *Citizens United* commits the Court to oligarchy. In the Court’s view, “the government” stands in a reciprocal relationship to “civil society.” Civil society elects officials; officials govern civil society. Government may not tamper with the

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<sup>121</sup> *Id.* at 908–11.

<sup>122</sup> Justice O’Connor worried that the Court was “inching sort of backwards as the money cre[pt] its way back into the judicial races” and stated that “justice is a special commodity. The more you pay for it, maybe the less it’s worth.” Sandra Day O’Connor, Closing Remarks at the Georgetown University Law Center Forum: Our Courts and Corporate Citizenship (Oct. 2, 2008) in Stephen Kaufman, *Contributions to Judicial Races Worrisome, Justice O’Connor Says* (Oct. 2, 2008), <http://www.america.gov/st/usg-english/2008/October/20081006101039esnamfuak0.1795618.html>.

mechanisms of its own creation—preventing such tampering is the central purpose of the First Amendment. Although the Court does not emphasize the obvious fact, the United States is a profoundly commercial society. Civil society is dominated by marketplace interactions. In practice, then, our government officials are chosen by the privileged classes who speak loudest in markets, not least through the purchase of the expensive media required to run a modern campaign. Government is thus constituted by, and presumably serves the interests of, the economically privileged classes in society—the definition of oligarchy.

To be clear: the oligarchy that *Citizens United* announces is not some version of the venerable argument that every nation falls short of its political ideals, and that our aspirations to be a democratic republic have always been compromised by the influence of money. The failure to achieve one's ideals is perhaps the human condition, but that is not the point here. The point is that contemporary First Amendment jurisprudence law does not operate to create a body of citizens who participate equally in governance. After *Citizens United*, most efforts to restrain or even organize the unequal influence of money over elections violate the First Amendment. As a majority of the Roberts Court understands it, the purpose of the First Amendment is to ensure that civil society is free to choose its rulers in its own image, without benefit of legislation.<sup>123</sup> If civil society is essentially commercial, constructed by the interaction of private interests in markets, then the government thereby created will serve essentially the wealthy, who speak loudest in markets. The idea of the republic—the *res publica*—distinct from society as a whole (society includes business enterprises, families, individual interests, and other “private” concerns) is thus lost.

If *Citizens United* is understood to be a decision written for a commercial republic (which seems highly unlikely), then the opinion is primitive. The Court does not employ a vocabulary sophisticated enough to articulate the relationships among the institutions at issue. Analysis of and prescription for such relationships is precluded by the Court's bifurcation between government and civil society. Maybe this is disappointing because a more nuanced understanding of the institutions of a commercial republic is vital to the legal heritage of the United States. In this light, the *Citizens United* opinion should be regarded as the product of inadequate education.

Alternatively and more plausibly, because it intentionally abandons its own heritage, the *Citizens United* opinion might be considered truly radical. Rather than the fairly complicated imagination of modes of public life that

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<sup>123</sup> *Citizens United*, 130 S. Ct. at 898 (“For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence.”).

this Article calls “a commercial republic,” the Court appears to have adopted a simple dualism, in which an essentially commercial civil society periodically comes together to choose governors who will protect and serve society’s dominant interests.

At this juncture, it would be useful to be a bit more explicit about the imagination of politics that I am calling “a commercial republic,” an imagination that the Court either does not understand or has abandoned.<sup>124</sup>

#### *D. The Political Economy of a Commercial Republic*

In *Citizens United*, three mechanisms for the ordering of social life are at issue: democratically elected representatives (in both the legislative and executive branches); courts, whose judges are legitimated by societal fealty to law; and markets, legitimated by a society’s use of, and commitment to, the institutions through which given markets are constructed, minimally notions of ownership (property) and exchange (contract). In ordinary American usage and the language of the Court, only the first of these mechanisms or contexts is called “political.” Courts are, or ought to be, “legal” and markets are “economic.” True enough, but it is important to remember that the structure and operation of our society—our politics in the more philosophical sense—is composed by the operation and interaction of these distinct (if not completely independent) social mechanisms.

Understanding that the mechanisms through which so much of social life is ordered are distinctively different from one another raises questions about the appropriate relationships among them. For an easy example, one should neither purchase a jury verdict (that is a crime), nor decide a legal question by referendum. Purchase is an entirely appropriate, indeed characteristic, mode of decision in a market, but not in a court. By the same token, aggregating personal preferences may make perfect sense in an election, but is not how judges or juries are supposed to decide cases in court. To generalize, the modes of decision appropriate for one political mechanism are often inappropriate in another. There are boundaries to consider. Illicitly transgressing such boundaries we may call corruption, the easiest example of which is a bribe, i.e., the use of a market mode of decision (purchase) in an inappropriate setting (such as a court or a legislature).

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<sup>124</sup> This Article relies upon ideas about capitalist politics, developed in a number of books, to think about corporate speech generally, and the *Citizens United* decision in particular. Space precludes me from doing more than sketching these ideas here. For those few so inclined, much more is available in DAVID A. WESTBROOK, *CITY OF GOLD: AN APOLOGY FOR GLOBAL CAPITALISM IN A TIME OF DISCONTENT* (2004). See also WESTBROOK, *supra* note 14.

A judicial decision about the participation of economic actors in democratic processes, like *Citizens United*, raises questions for each political mechanism. With regard to law, the Court discusses whether or not it was justified to hear the case before it so broadly, and to strike down a democratically legitimated federal statute and its own precedent while doing so.<sup>125</sup> Such discussion, and certainly the dissent's objections,<sup>126</sup> bespeaks awareness of the institutional danger that the Court will be understood to be political, which is a danger to the legitimacy of the institution almost as obvious as the understanding that the Court is essentially a market and that justice is for sale.

*Citizens United* obviously raises questions about electoral processes and legislative power—that is, about “politics.” This is a First Amendment case, and as such, written through the lens of the First Amendment's traditional concern for political speech—that is, elections. Both the majority and the dissent treat *Citizens United* as a case about the influence of money upon electoral politics and how, if at all, the federal government may constitutionally address that relation.

But the BCRA regulates corporations; thus, *Citizens United* also raises questions about “markets.” And if we look at *Citizens United* through a capitalist lens, a very different picture of the case emerges. To recall the forest for the trees, it should be pointed out that *Citizens United* is in fact about “corporations” and “payments,” in simple senses of the words. Only with extreme and widely criticized effort does the majority maintain that corporations are really political actors and payment is really speech. So it makes sense to think of *Citizens United* as a case about corporations, payments, and markets, as well as in terms of citizens, speech, and elections.

If we think of *Citizens United* in capitalist terms, the majority's decision is simply wrong, or at least incompatible with very longstanding ideas of how commerce, and hence this commercial republic, operate. First, as discussed in Part IV, “Corporations and Other Legal Persons,” a corporation's speech is, as a matter of law, essentially commercial in nature and may be regulated accordingly.<sup>127</sup> Moreover, the form of a business association matters. To understand corporations as speaking for their shareholders is to understand corporations as partnerships, i.e., not to understand the corporation on its own terms. (It also gets partnership law wrong.) In practice, the Court's decision empowers managers at the cost of shareholders. In so doing, the *Citizens United* decision almost wordlessly decides, in favor of management,

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<sup>125</sup> *Citizens United*, 130 S. Ct. at 891–92.

<sup>126</sup> *Id.* at 931–38 (Stevens, J., dissenting).

<sup>127</sup> See discussion *infra* Part V.

the fruitful tension between a company's management and its owners that has animated corporation law through the 20th Century.<sup>128</sup>

Second, as discussed in Part V, "The Regulation of Payments and Speech," the government unquestionably has the authority to legislate the structure and conduct of payments.<sup>129</sup> Moreover, the government has the authority to regulate marketplace speech (either natural language or price signals) and does so ubiquitously. Indeed, the careful establishment of informational regimes is what the construction of modern markets is all about. Thus, the Court's key constitutional move, striking down federal law regulating corporate payments, makes no sense from the perspective of *markets*, whatever sense it may make from the perspective of *elections*.

Third, as discussed in Part VI, "Markets and the Problem of Corruption," looking at *Citizens United* from the perspective of constructing sound markets raises a question completely unaddressed by the Court: What about the corruption of markets by legislatures?<sup>130</sup> Boundaries may be transgressed in both directions, yet the *Citizens United* majority only considers (and generally dismisses) the possibility of elections being corrupted by being turned into markets.<sup>131</sup> The dissent makes passing reference to the possibility that the *Citizens United* decision may be bad for business, but the dissenters are also primarily concerned with the possibility of money corrupting elections.<sup>132</sup> The problem of the corruption of markets by politics deserved more sustained attention.

The logic of *Citizens United* undermines the construction of sound markets by encouraging the pursuit of government favorable to the interests of a given corporation: rent-seeking legislation on a grand scale. The abolition of campaign expenditure restrictions encourages business to compete for government favors. *Citizens United* institutes the economic logic of a courtier economy: firms will do well if they secure the favor of the sovereign. In good times, such firms can look forward to contracts and favorable regulation. In bad times, as demonstrated during the financial crisis, it is really helpful to have the direct support of the king, who can provide guarantees, low-cost financing, and sweet liquidity until the storm passes. Other firms, less favored, will fail or be so weakened that they can be purchased at bargain prices, perhaps with government financing.<sup>133</sup>

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<sup>128</sup> For an account of the tension, see BERLE & MEANS, *supra* note 93. See also WESTBROOK, *supra* note 124.

<sup>129</sup> See discussion *infra* Part VI.

<sup>130</sup> See discussion *infra* Part VII.

<sup>131</sup> *Citizens United*, 130 S. Ct. at 908–09.

<sup>132</sup> *Id.* at 965 (Stevens, J., dissenting).

<sup>133</sup> See WESTBROOK, *supra* note 14.

## IV. CORPORATIONS AND OTHER LEGAL PERSONS

*A. Corporate Speech Is Commercial Speech and May Be Regulated*

The Supreme Court erred insofar as it held that Congress cannot regulate electioneering communications made by for-profit corporations. (Strictly speaking, that case was not before the Court and so its pronouncements to that effect might be regarded by subsequent courts as dicta.) In reaching this conclusion, the Court followed a line of reasoning that is somewhat plausible, especially for people who do not understand corporation law, but that does not bear analysis.

Assuming with the Court that the payment at issue in *Citizens United* ought to be regarded as “political speech” for First Amendment purposes, why is it the case that for-profit corporations have First Amendment rights to make such payments and any effort to regulate such payments is subject to strict scrutiny? The Court’s reasoning begins from the uncontroversial proposition that individuals have extensive First Amendment rights to engage in political speech.<sup>134</sup> Forming associations, argues the Court, does not destroy such rights.<sup>135</sup> Anything people can say individually they can say collectively, in groups. Thus the “identity of the speaker”—in this context, the form of the association—does not matter. The entity in question may be a not-for-profit, like *Citizens United*; a for-profit corporation; a union; or presumably some other form of association. Since associations are composed of people, an association must have the same speech rights as the people who compose them.<sup>136</sup> Or so reasoned the Court.

The Court’s argument does not hold water. Individuals who join a commercial enterprise do not thereby give up their rights to engage in political speech. Most middle class Americans with retirement investments hold equity, directly or indirectly, and have thus joined a commercial enterprise—but investors still retain their rights to speak politically. Because people who join commercial enterprises retain the right to speak as individuals, the Court’s talk of destroying an individual’s right to engage in political speech is misleading. The question is whether an individual’s right to speak is somehow transferred to the association. Not all individual rights are transferred to associations that the individual joins. Individual rights to vote and to get married, for example, are not transferred from individuals to

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<sup>134</sup> *Citizens United*, 130 S. Ct. at 898–99.

<sup>135</sup> *Id.* at 900.

<sup>136</sup> *Id.* at 903–08.



the business entities that they join (at least not yet).<sup>137</sup> Thus, the fact that an association is formed does not mean that the association automatically enjoys all the rights of its members.

What about the right to speak? Is it somehow transferred to associations of individuals? The “speech” at issue in *Citizens United* is a payment from the company’s treasury—that is, the disposition of an entity’s assets. Disposing of a company’s assets is not something that a shareholder in a business corporation has a right to do.<sup>138</sup> The corporation’s assets belong to the corporation,<sup>139</sup> and management has legal power over the assets under the ultimate supervision of the board of directors. That is, spending money from the general treasury is a right the shareholders do *not* have. Consequently, in making payments, as a matter of law and not merely practical convenience, it is simply wrongheaded to say that the corporation is exercising a right derived from the shareholders.

Corporations also may speak, in a rather more ordinary sense of the term, in making contracts: that is, companies may use language to obligate the entity.<sup>140</sup> But shareholders do not speak on behalf of the corporation; shareholders cannot contract on behalf of the corporation.<sup>141</sup> The entire practice of ensuring that corporate actions are taken by duly authorized agents of the corporation, in some circumstances requiring a resolution of the board or even a vote of all the shareholders, entails the proposition that corporate speech is fundamentally distinct from shareholder speech. Nor are shareholders responsible for the corporation’s speech once made, except insofar as they have an interest in the corporation. Limited liability means that the corporation may make commitments, may be unable to make good on such commitments, and creditors will not be able to seek the assets of the shareholders.<sup>142</sup>

The essential point—completely overlooked by the *Citizens United* Court—is that the corporation and its shareholders are separate legal entities

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<sup>137</sup> It is with trembling anticipation that I await the first marriage between corporations, which will afford the corporations the privilege of not testifying against one another. A number of mutually suitable matches spring to mind.

<sup>138</sup> Although *Citizens United* was established as a not-for-profit, the discussion below turns on the nature of the business corporation. Obviously, had the *Citizens United* decision been limited to its facts, this discussion would be superfluous. But the *Citizens United* decision by its terms applies to business corporations. Contributors to *Citizens United* were business corporations, and political concern is all about the role of business corporations.

<sup>139</sup> 1 WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 31 (2003).

<sup>140</sup> The powers of the corporation include contracting. 1 WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 25 (2003).

<sup>141</sup> *Id.* at § 29.

<sup>142</sup> *Id.* at § 20.

for almost all purposes.<sup>143</sup> Special circumstances exist in which the legal separation between the corporation and its shareholders may be obscured or erased. But such circumstances tend to prove, rather than disprove, the general principle that shareholders and their corporations are legally distinct entities, which do not speak with one voice. So, for example, if a dominant shareholder abuses the corporate form, a court may “pierce the corporate veil” and allow creditors to recover against the shareholder, thereby making the shareholder responsible for the contractual speech of the corporation.<sup>144</sup> The point of such cases, however, is that the institution of the corporation is not respected: the corporation exists only as a sham, and therefore the owner ought to be liable for the obligations of the business, as in a sole proprietorship. In general, shareholders qua shareholders simply do not have a right to spend corporate assets; to contract on behalf of the corporation; or with the narrow exception of the shareholder derivative suit, to speak for the corporation.<sup>145</sup> Corporate speech is not shareholder speech, nor is shareholder speech corporate speech. The Court’s argument that the right of the corporation to speak is derived from the right of the shareholder to speak is simply wrong.

It is the corporation’s *managers*, but not its shareholders, who make payments from a corporation’s treasury, and who are therefore “speaking.” It is indeed hornbook law that managers (and directors) act on behalf of the corporation and its shareholders. But this does not mean that the speech of managers may be equated with that of shareholders, so that managers exercise the free speech rights of the shareholders—that is, the shareholders’ free speech rights have been transferred to the corporation, which is speaking for the shareholders. Why not?

First, as a practical matter, shareholders have no easy way of knowing what managers are saying on their behalf. (In a world of managed funds, short selling, and high frequency trading, very few shareholders know the names of all the companies in which they are invested.) The Court dismisses this objection by noting how good modern information systems are and noting that discontent shareholders can divest, i.e., the Court assumes a stock

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<sup>143</sup> *Id.* at § 25.

<sup>144</sup> See, e.g., *In re Mass*, 178 B.R. 626, 629 (M.D. Pa. 1995) (noting that in the traditional piercing of the corporate veil case, a creditor or Trustee pierces the corporate veil to reach through the corporation to reach the assets of the individual shareholders).

<sup>145</sup> The limited circumstances of the equitable proceeding of the shareholder derivative suit provide a partial exception: when the board of directors will not pursue the corporation’s rights, a court may hear a suit brought on behalf of a corporation by a shareholder, a so-called shareholder derivative suit. In this limited judicial context, the shareholder may be said to speak for the corporation.

market with contemporary information technology and 19th Century trading patterns. Again, the Court does not bother to think about how markets work.

Second, managers cannot speak politically on behalf of shareholders for legal reasons that have nothing to do with whether a manager happens to have the same political preferences as a shareholder. Managers and directors are fiduciaries of the shareholders. Fiduciaries act when the beneficiaries of their actions do not act. The institution of the trust was established to allow a legally competent person to act even though the beneficiary of the trust (often a minor, a woman before women were granted the franchise, or a noble cause) lacked the legal capacity to act. Indeed, the beneficiaries of a trust, like the shareholders of a corporation, do not have the legal right to control the assets of the entity. Thus, a manager's speech—insofar as the manager is speaking with regard to the assets of the entity, as here—is different in kind from rights of the shareholders to whom she owes fiduciary duties.

Third, managers are required, as a matter of law, to act in the business interests of the shareholders—a general principle usually taught through the classic case of *Dodge v. Ford Motor Co.*<sup>146</sup> In that case, Henry Ford, who undeniably dominated the Ford Motor Company's Board of Directors, was sued by the Dodge brothers, shareholders, for among other things, not issuing a special dividend, even though the company held large reserves of cash.<sup>147</sup> Ford argued in open court that the shareholders had made enough money and that he, Ford, was more interested in helping American workers by giving them good jobs (paying above market wages) and American consumers by giving them good cars, on which he planned to make less money than he might otherwise.<sup>148</sup> The Michigan Supreme Court pointedly reminded Ford that he owed a duty to his shareholders to run a business.<sup>149</sup>

The purpose of for-profit corporations is to carry on profitable businesses.<sup>150</sup> In the modern corporation, chartered under general incorporation laws, the idea of the "purpose" for which an institution is chartered has gotten very broad, and conversely, the doctrine of *ultra vires* has gotten very small.<sup>151</sup> But a for-profit corporation is chartered to carry on a business for profit, and carrying on a business essentially not for profit would

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<sup>146</sup> 170 N.W. 668 (Mich. 1919).

<sup>147</sup> *Id.* at 670–71.

<sup>148</sup> *Id.* at 671.

<sup>149</sup> *Id.* at 683.

<sup>150</sup> Delaware law, Virginia law, and the Model Business Corporations Act all include provisions to this effect. DEL. CODE ANN. tit. 8, § 101 (West, Westlaw through 78 Laws 2011, chs. 1–72, 75, 79–92); VA CODE ANN. § 13.1-626 (LEXIS through End of 2011 Regular Session and includes 2011 Sp. S.L. C.1); MODEL BUS. CORP. ACT §§ 1.40(4), 3.01(a).

<sup>151</sup> But see Kent Greenfield, *Ultra Vires Lives!: A Stakeholder Analysis of Corporate Illegality (with Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279 (2001).

be, by definition, beyond the authority of the business. All of which is tantamount to saying that the activities of a business corporation are, by virtue of the structure of the corporation, commercial in nature.<sup>152</sup> Even if payments made by a corporation's managers are construed as speech, as in *Citizens United*, such speech is by (traditional) law the speech of managers, made in the commercial interest of shareholders, but not the expressions of shareholders. If such payments are speech, they are perforce commercial speech. The Supreme Court has long held that commercial speech may be regulated<sup>153</sup> without requiring the government to show a "compelling interest"<sup>154</sup> under the "strict scrutiny"<sup>155</sup> of the judiciary.

To summarize: payments made by a corporation cannot be the speech of its shareholders because shareholders do not have the right to dispose of assets, nor are they liable for the obligations of the corporation. Corporations, i.e., managers, make payments ("speak") in the interest of the corporation and its shareholders, but such interest is understood to be, as a matter of law, essentially commercial, and commercial speech may be regulated.

### *B. The Form of Business Associations Matters*

As suggested by the foregoing analysis, different actors in a business entity play legally defined roles and what they can do—or "speak"—is thereby circumscribed in important ways.<sup>156</sup> Contra the Court, the identity of the speaker matters a great deal, at least as a matter of the law of business associations which the Court refused to examine.<sup>157</sup> Specifically, the Court makes a fundamental conceptual error by treating corporations as if they are essentially the same as partnerships, entities expressive of their owners, for which the owners are ultimately responsible (and it gets partnership law wrong, too). Justice Thomas, discussing *Citizens United* on the occasion of a

<sup>152</sup> Conversely, a shareholder's interest in the corporation is essentially economic as opposed to political, a general principle taught through *Pillsbury v. Honeywell*. In that case, a shareholder sought to see shareholder lists in order to mount a campaign against Honeywell's involvement in the Vietnam War. Honeywell denied Pillsbury access to the books and records of the company. The court sided with Honeywell; Pillsbury's interest was in politics, not business. *Pillsbury v. Honeywell*, 191 N.W.2d 406 (Minn. 1971).

<sup>153</sup> See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980). As suggested *infra* note 189 and accompanying text, regulated commercial speech is ubiquitous. In a world in which food, drugs, consumer products, cars, credit cards, investments—in short, the material of consumer society—are all subject to speech regulation, citing the Supreme Court's occasional concern with advertising is somewhat risible.

<sup>154</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010).

<sup>155</sup> *Id.*

<sup>156</sup> As suggested above, the Court simply does not consider markets in any detail—civil society is a mere placeholder for First Amendment jurisprudence, which is concerned with the limitation of government power.

<sup>157</sup> The Court reasons from media corporations and PACs in a case about not-for-profit corporations to establish rules that apply to business corporations and unions.

speech at Stetson University, made at least his own (mis)understanding of the corporation on the model of partnership explicit:

If 10 of you got together and decided to speak, just as a group, you'd say you have First Amendment rights to speak and the First Amendment right of association. If you all then formed a partnership to speak, you'd say we still have that First Amendment right to speak and of association. But what if you put yourself in a corporate form?<sup>158</sup>

It appears that the Supreme Court does not understand, or at least does not take seriously, the differences between a partnership and a corporation. A partnership is an association of two or more persons to carry on a business for profit.<sup>159</sup> Although a partnership is a legal entity distinct from its owners,<sup>160</sup> the partners may speak on behalf of the company—that is, partners may obligate the partnership.<sup>161</sup> Along the same lines, partners may make payments out of the company's assets. The partnership and, ultimately, the other partners are liable for the actions—including speech—of each partner.<sup>162</sup> Moreover, partners have rights to participate in management,<sup>163</sup> and therefore it makes sense to hold the partners ultimately liable for the company's actions.

Although a general partnership is a legal entity distinguishable from its owners, the rights and responsibilities of the partnership cannot be sundered completely from the rights and responsibilities of the owners of the entity: the partners.<sup>164</sup> It therefore might make some sense to say of a partnership that the expressions of the entity should be considered to be the expressions of the owners of the entity. The institution of partnership thus exemplifies an association that can, in some sense, be said to speak collectively for its owners.<sup>165</sup>

Contra Justice Thomas, however, partnership law hardly justifies the Court's *Citizens United* decision. First, on the facts, *Citizens United* was a

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<sup>158</sup> Justice Clarence Thomas, Address at Stetson University (Feb. 2, 2010), in Ashby Jones, *Justice Thomas Addresses Citizens United, While Justice Kennedy Punts*, WALL ST. J. L. BLOG (Feb. 4, 2010, 9:26 AM), <http://blogs.wsj.com/law/2010/02/04/justice-thomas-addresses-citizens-united-while-justice-kennedy-punts/>.

<sup>159</sup> UNIF. P'SHIP ACT § 101(6) (1997).

<sup>160</sup> *Id.* at § 201(a).

<sup>161</sup> 1 WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 18 (2003).

<sup>162</sup> UNIF. P'SHIP ACT § 301.

<sup>163</sup> *Id.* at § 401(f).

<sup>164</sup> *Id.* at §§ 305(a), 306(a).

<sup>165</sup> Perhaps this traditional notion of partnership has been somewhat obscured by the recent emergence of many "hybrid" forms of business association, such as limited liability partnerships, limited liability limited partnerships, and even limited liability companies, as well as the older limited partnership, all of which bear some of the characteristics both of the traditional general partnership and of the business corporation—hence "hybrid."

corporation (not a partnership) and, as discussed above, partners are importantly different from contributors to not-for profit corporations—to say nothing of the shareholders of for-profit corporations. Second, even if Citizens United had been structured as a partnership so that one might conceive that the company spoke for its owners (as in a political action committee), the company's speech would still be commercial in nature because partnerships are constructed to carry on a business for profit,<sup>166</sup> as a matter of law, and are therefore subject to regulation. Third, partners owe the partnership and one another fiduciary duties.<sup>167</sup> At least traditionally, a partner in a law firm who used partnership assets for campaign expenditures without the consent of the partners would be answerable to the partnership.

Interestingly, Citizens United argued that § 441(b) was unconstitutional as applied to it, because it was in effect a political action committee (PAC), which is indeed structured so that a group of people may speak with one political voice to engage in policy advocacy. Contributors to Citizens United intended to speak politically and collectively.<sup>168</sup> This argument was brushed aside by the Court.<sup>169</sup>

As discussed above, the “speech” at issue in *Citizens United* in fact was made by the managers of the company; the shareholders do not have the power to spend the corporation's money. For good reason, the Court does not argue that corporate political speech cannot be restricted because *managers* enjoy a First Amendment right to speak politically. The central problem in corporation law, long ago articulated by Berle and Means, is that managers are continually tempted to take the corporation's assets for their own purposes.<sup>170</sup> But corporations are not piggy banks for managers. The manager who uses corporate assets for personal purposes is, in extreme cases, subject to criminal sanctions. Shareholders or directors may sue managers who violate their fiduciary duty of loyalty by placing their own interests, presumably including political alliances, above those of the corporation and its shareholders, to say nothing of actions for waste or fraud.<sup>171</sup> More simply still, directors may and should replace such

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<sup>166</sup> UNIF. P'SHIP ACT § 101(b).

<sup>167</sup> *Id.* at § 404.

<sup>168</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 891 (2010).

<sup>169</sup> *Id.* at 891, 897–98 (arguing that the existence of PACs did not cure the constitutional infirmity of BCRA).

<sup>170</sup> The *locus classicus* is BERLE & MEANS, *supra* note 93.

<sup>171</sup> Any number of actions has been brought against the CEOs of companies in recent years. See, e.g., Andrew Backover & Edward Iwata, *Shareholder Lawsuit Says WorldCom Kept \$696M in Bad Debt on Books*, USA TODAY, Mar. 18, 2002, at 2B; Ken Belson, *Adelphia Proposes to Settle Federal Cases*, N.Y. TIMES, Dec. 29, 2004, at C2; Christine Dugas, *Tyco Sues Former Chief over Self-Serving Gifts*, USA TODAY, Sept. 16, 2002, at 3B; Edward Iwata, *Enron Lawsuits out of Control, Lawyers Say*, USA TODAY, May 10, 2002, at 5B.

managers.<sup>172</sup> So, while managers have every right to engage in political speech, they have no right to use shareholder assets to advance their personal political agendas.

The Bipartisan Campaign Finance Reform Act of 2002 (BCRA) reinforced this very traditional corporate law thinking. The Act did not prevent speech in the sense of making or distributing the film *Hillary: The Movie*.<sup>173</sup> Nor did the Act prevent any individual from making campaign expenditures.<sup>174</sup> Even collections of individuals could make such expenditures so long as they did so collectively, by forming a PAC.<sup>175</sup> What the Act did was prohibit managers from spending other people's money to make campaign expenditures, i.e., the Act addressed an expression of the central problem of corporate governance, long ago identified by Berle and Means.<sup>176</sup> The BCRA was not only about democratic governance; it was also about corporate governance.<sup>177</sup> Like the Sarbanes-Oxley Act of 2002,<sup>178</sup> BCRA regulated the role of managers in the operation of corporations. Sarbanes-Oxley used securities law in an effort to require managers to act more transparently, perhaps preventing fraud. BCRA used election law to insist that managers run businesses rather than use shareholder assets to curry favors.<sup>179</sup>

Presumably, the Court did not intend to strike down *Dodge v. Ford*, and with it over a century of corporate law that understood corporations as essentially commercial entities. And surely the basic tenet of corporate law that managers owe duties to shareholders still holds. By the same token, the

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<sup>172</sup> The Court does not make the truly radical argument that the corporation, as such and as distinct from people, has a First Amendment right to participate in democratic politics. One might imagine giving "rights" to living things that are not people, and perhaps one might imagine giving "rights" to institutions and other things of cultural significance. But the Supreme Court does not do so in this case. For now, at least, democracy is still about the *demos*, people.

<sup>173</sup> See *Citizens United*, 130 S. Ct. at 887.

<sup>174</sup> See *id.* at 972 (Stevens, J., dissenting).

<sup>175</sup> *Id.* at 897.

<sup>176</sup> See BERLE & MEANS, *supra* note 93.

<sup>177</sup> As a corollary, corporate governance is not unrelated to democratic governance. It is often forgotten that Berle and Means are very concerned with the concentration of the nation's economic power in the hands of relatively few managers, who control relatively few, but very large, modern corporations. To put it mildly, such power has political consequences. See *id.*

<sup>178</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

<sup>179</sup> This argument should not be taken too far. BCRA only limits managerial ability to make campaign expenditures within a limited time of an election (60 days) or a primary (30 days), and clearly BCRA was motivated primarily by concerns for democratic process rather than business integrity. It should be noted, however, that as a practical matter, the temptation to make such expenditures is higher close to elections, and therefore limiting the prohibition in time, hardly compromises shareholder protection. Moreover, prohibiting campaign expenditures for a limited time might be considered less restrictive, and therefore more likely to survive constitutional challenge, on the analogy of a time, place, and manner restriction.

Court could not have intended to abolish the notion of management misappropriation of shareholder assets, at least so long as the assets are used to advance the political preferences of managers. Thus, unless *Citizens United* represents a wholesale revision of corporation law, then payments made by corporate managers for partisan ends may still be regulated.

## V. THE REGULATION OF PAYMENTS AND SPEECH

Whether considered as a transfer of value (payment), or as a communication (speech), the payments at issue in *Citizens United* can be regulated.

### A. Payments

Although the Supreme Court treats the payments at issue in *Citizens United* as “speech” protected by the First Amendment, it is by no means obvious that the payments of money in question ought to be deemed “speech.”<sup>180</sup> Whether or not the payments are “speech,” however, they are certainly payments, i.e., *Citizens United* sought to pay cable television companies to defray the costs of exhibiting *Hillary*.<sup>181</sup> Government regulation of politically motivated payments is as old as government itself. The state may require payments to the state itself—that is, taxes—which are paid at particular times and places, and in specific manners. Conversely, the state may prohibit payments to certain political actors, by outlawing bribery. In either case, the law frankly regulates the payment of money for political purposes; the state traditionally governs payments as a form of political regulation.

It is not merely the circumstances of politically motivated payments that are regulated. The very activity of payment involves the state in sundry ways. Entire bodies of law, ranging from U.C.C. regulation of commercial paper to bank and credit card regulation to the prohibition on counterfeit currency govern how payments are made and with what instruments. More deeply still, the substance of payment itself—fiat money—is a product of the state. Money is held and distributed through the elaborately regulated Federal Reserve System. The exchange value of currency is influenced by monetary policy. In short, the act of payment is a deeply legal act, and government has a lot to say about payment.

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<sup>180</sup> See Hellman, *supra* note 70.

<sup>181</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 887 (2010).



This is not to deny that the First Amendment may prohibit Congress from regulating certain payments made for political purposes. Justifying a ban on congressional action, however, would require an understanding of payments and the interrelationships among legislatures, markets, and courts. Such an understanding would have to be considerably more nuanced than equating payment with speech and reciting the constitutional text. Within the dualist political economy of the *Citizens United* decision, however, no such nuance is possible, and so payment is simply equated with speech.

It is true that price is widely believed to signal—that is, price is believed to be the way communication happens in—markets, hence the recently fashionable speech about the informational efficiency of capital markets.<sup>182</sup> So, one might argue (the Court does not), that the real “speech” that *Citizens United* is concerned with is in fact payment, like payments for the distribution of *Hillary*. From this perspective, even if one understands markets as, like courts and campaigns, political contexts, it might seem that *Citizens United* makes perfect sense. In a market, how are decisions made? Through the price mechanism—that is, the willingness and ability to buy and sell at a price fixed by negotiation. Thus, it might seem that “speaking” in a market flows from the capacity to participate in the market—that is, the right to own property, to sue and be sued, to buy and sell, and to make binding obligations. Participation in the fluxion of demand sending price signals and thereby communicating, is what “speaking” means in the context of a market.<sup>183</sup> Corporations are full participants in markets; they can certainly make payments; therefore, they should be able to pay for the distribution of *Hillary*.

By this logic, and as Justice Stevens suggests in dissent, corporations should be able to vote.<sup>184</sup> But corporations do not vote, at least not yet. Moreover, as we have seen, payment is deeply regulated and could not in fact function without substantial government action. There simply is no freedom of payment in any sense like there is a freedom of speech. Why not?

Simply put, payment is not speech. The analogy between money and speech is so prevalent in the United States that it can be difficult to recall that money is not speech and that making a payment is not the same thing as uttering a sentence. Money and words signify and carry meaning in different

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<sup>182</sup> The Efficient Capital Markets Hypothesis (ECMH) has been a mainstay of finance for decades. For an introduction, see BURTON G. MALKIEL, *A RANDOM WALK DOWN WALL STREET: THE TIME-TESTED STRATEGY FOR SUCCESSFUL INVESTING* (10th ed. 2011). ECMH has lost a great deal of credibility in light of unexplained volatility in the financial markets.

<sup>183</sup> Taking the analogy between money and words seriously is one of the signal follies of our era. See WESTBROOK, *supra* note 124.

<sup>184</sup> *Citizens United*, 130 S. Ct. at 948 (Stevens, J., dissenting).

ways.<sup>185</sup> The payment of money signifies, first and foremost, the buyer's desire for something and willingness to trade a good, money, in order to obtain that thing. Money is "frozen desire," in James Buchan's apt phrase.<sup>186</sup>

One may desire many things, some licit, others illicit. The law makes any number of payments illegal, and regulates how one pays in countless situations. One may not pay for a slave, and one may pay for drugs or home mortgages, but only in highly regulated ways. The fact that payments may be understood expressively (e.g., "I wanted to buy drugs") does not vitiate regulation of the payment. The scope of payment is far more restricted than the scope of speech—one may talk about many things that one is legally prohibited from buying or doing.

It is completely understandable to desire a judicial decision or a statute. So it may be expected that those with the means may be inclined to pay bribes or perhaps merely make "expenditures," e.g., campaign advertising, that benefit certain people in a position to help. From within the logic of payment, in which the transfer of funds expresses and achieves a desire, there is nothing wrong with outright bribery, which after all is payment for a service. Bribery is wrong because we expect more from courts and legislatures, not more from payment. More generally, it is the function of the law in a commercial republic to set bounds to markets, to elections, and to the legal system itself.<sup>187</sup>

The foregoing is not meant to imply that markets do not have moral codes. They do. We expect market participants to respect the law of the place, including the laws of contract and property. Indeed, without respect for property, strong participants could be expected to gratify their desires through seizure rather than payment. And while we acknowledge desire ("self-interest") in marketplaces (as we must acknowledge personal ambition in elections), we often expect market participants to employ more than the "morality of the marketplace," as Justice Cardozo famously called it.<sup>188</sup> In a host of situations, business law demands not merely honesty but trust, loyalty, care for others, and general good faith—fiduciary duties. Even in the marketplace, more than the logic of payment rules. Thus, it is hardly surprising that in markets, payment may be regulated.

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<sup>185</sup> See WESTBROOK, *supra* note 124, at 39–56.

<sup>186</sup> AMES BUCHAN, *FROZEN DESIRE: AN INQUIRY INTO THE MEANING OF MONEY* (1997).

<sup>187</sup> See WESTBROOK, *supra* note 14 (discussing markets in terms of games, as bounded contexts for competitive activity).

<sup>188</sup> *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

### B. Speech

In markets, speech is routinely regulated for a number of reasons. Speech regulation in marketplaces is generally not viewpoint neutral, objective, or the like. In the same vein, and directly contra *Citizens United*, marketplace speech may be regulated based upon the identity of the speaker, and sometimes the listener.<sup>189</sup> In short, markets are what they are largely because of speech regulation.

The common law of contracts has long regulated speech under doctrines of misrepresentation and fraud. A party to a contract who relies upon an innocent misrepresentation made by the other party and is harmed thereby has an action for reliance damages.<sup>190</sup> If the misrepresentation was intentional, i.e., if there was fraud, the injured party may seek consequential damages and the state may impose criminal sanctions.<sup>191</sup>

Moving from common law to regulation, consumer protection laws in the 20th Century require "truth in advertising."<sup>192</sup> In many markets, products are legally required to be labeled. More generally, in many markets, regulation requires participants in the market to disclose information to consumers and other market participants. So, for pertinent example, a corporation or other limited liability entity must disclose the fact that the owners of the business are not ultimately responsible for the liabilities of the business. And in *Citizens United* itself, the Court upheld BCRA requirements that those making campaign expenditures disclose their identities, even if the name of a specially established corporation, such as Citizens United, or a general association, such as the U.S. Chamber of Commerce, conveys little specific information.<sup>193</sup> The principle, however, is that participation in many, perhaps most, markets is conditioned upon and shaped by mandatory disclosure requirements. Speech is mandated all the time.

In constructing markets in which we wish to encourage appropriate risk taking, speech is regulated. Consider, in this regard, the elaborate and growing system of disclosures that surrounds consumer lending. Consider also the information-forcing function of securities law, which is designed not only to encourage appropriate risk taking by investors, but to facilitate the sound pricing of capital. When we consider markets as mechanisms of public choice, it is often the regulation of speech, not the absence of regulation, that informs the interaction of market participants. Markets are, in this sense, like

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<sup>189</sup> *Citizens United*, 130 S. Ct. at 902.

<sup>190</sup> RESTATEMENT (SECOND) OF CONTRACTS § 349 (1981).

<sup>191</sup> RESTATEMENT (SECOND) OF TORTS §§ 549(1), 549(1) cmt. a (1977).

<sup>192</sup> See 15 U.S.C. § 53 (2006).

<sup>193</sup> *Citizens United*, 130 S. Ct. at 916.

courts: the information available to the participants is structured by a more or less elaborate system of legal requirements. Thus, from a capitalist perspective, the idea that Congress may not regulate a corporation's speech is very strange.

One might object to this argument by noting that the state may require or otherwise regulate speech in the commercial context precisely because it is only the commercial context, not the political context. Speech in markets is not about establishing the state, re-signing the social contract, and therefore such speech may be regulated. For the reasons suggested above, the First Amendment insists that the state may not entrench itself, or extend its reach, by regulating political speech.<sup>194</sup> The First Amendment, in this view, prohibits regulation of speech in the realm of "politics," but allows regulation of speech in the realm of "markets." While plausible in its way, there are several problems with this "two kingdoms" approach.

First, understanding "politics" as a realm of constitutionally protected free speech, in contradistinction to markets, where speech may be regulated, radically understates the importance of markets to our society, and indeed to our government, and conversely, of government to our markets. One of the major concerns of government is the establishment and maintenance of healthy markets, for everything from vegetables to air travel to consumer finance to microprocessors. The idea that markets are somehow "outside" of politics in a highly regulated and highly capitalistic society is simply naïve.

Second, First Amendment jurisprudence does not in fact take a "two kingdoms" approach, at least not in any clear-cut fashion. Corporations have First Amendment rights to speak in markets, so called "commercial speech."<sup>195</sup> Voters have more expansive First Amendment rights to speak in political campaigns, so called "political speech."<sup>196</sup> Thus the First Amendment applies both to speech in markets and in political campaigns. The question for First Amendment jurisprudence, at least in a commercial republic, is the interplay between the modes of social decision, and hence the structure of speech regulation.

In practice, the "commercial" and the "political" overlap, often by design. Corporations may mix their sales pitches with a political message.<sup>197</sup>

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<sup>194</sup> See *supra* note 134 and accompanying text.

<sup>195</sup> See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562 (1980).

<sup>196</sup> "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of our system of government. As a result, the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2816–17 (2011) (internal quotations and citations omitted).

<sup>197</sup> See Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 634 (2006).

Or business interests may argue that a requirement that the corporation speak, or a limitation on its speech, is prohibited by the First Amendment as articulated by the *Citizens United* Court. Indeed, the Business Roundtable has challenged proposed Rule 14a-11, which gives shareholders the right to nominate directors via the company's annual proxy solicitation, as coerced speech, in violation of the corporation's right to speak freely.<sup>198</sup> These are examples of the "train wreck" of First Amendment jurisprudence: there is no easy way to square the Court's extremely *laissez faire* attitude toward "political" speech with the Court's acceptance of marketplaces in which speech is highly regulated.<sup>199</sup> Indeed, at least conceptually, "[i]f giving and spending money are always expressive, then all economic regulations risk impinging on the First Amendment."<sup>200</sup>

Third, and most problematically at present, *Citizens United* itself maintains that marketplace speech is about making government. If corporate money can be spent in the discretion of a corporation's management, presumably for the good of the corporation and its shareholders, then there is no serious distinction between speech in the marketplace and speech on the campaign trail. It is all about making money. There is no discrete realm of politics. If civil society is essentially commercial, then it is unclear where the constitutional power to regulate speech in a commercial context stops, or why. Or, just as logically, perhaps all speech is political. This is another way to understand what oligarchy means, which brings us to the next section.

## VI. MARKETS AND THE PROBLEM OF CORRUPTION

As already mentioned, in *Citizens United* the Supreme Court considers whether or not "markets" corrupt "elections," specifically, whether corporate money used to buy advertising unduly influences democratic processes. From a more thorough-going capitalist perspective, however, which focuses on corporations rather than citizens, payment rather than speech, and markets rather than elections, the situation looks quite different. On the facts of the case, what is *Citizens United* buying? How are such purchases regulated or otherwise constrained? How is the market in which *Citizens United* and similar entities operate defined? What would constitute a healthy market in these circumstances? Most obviously, does the influence of political (here

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<sup>198</sup> Opening Brief of Petitioners Business Roundtable & Chamber of Commerce of the United States of America at 4, *Bus. Roundtable & Chamber of Commerce v. S.E.C.*, No. 10-1305 (D.C. 2011), 2011 LEXIS 14988, at \*6-7.

<sup>199</sup> See Siebecker, *supra* note 197, at 616.

<sup>200</sup> Hellman, *supra* note 70, at 964.

meaning legislative or especially administrative) power corrupt the operation of the market?

To understand a market as a mode of social choice implies that the market can function more or less well; a market, like a court or a legislature, may perform its work more or less appropriately. A market may be healthy or it may be unhealthy. During the financial crisis of 2008 and since, numerous markets were revealed to be profoundly unhealthy, indeed dysfunctional. A few markets failed outright and ceased operating altogether. Thus, to take a capitalist perspective is not to cease political critique; it is to ask whether the market in question is operating as it should.

From a capitalist perspective, purchases of media exposure on behalf of a candidate are presumably made for self-interested reasons. But what are Citizens United and similar entities buying? Government has a number of things to sell, including property and contracts of various sorts—the government is an enormous economic actor in its own right. In a world of highly regulated businesses, moreover, the shape of regulation matters. Laws may be variously enforced. Competitive advantages may be acquired. Government may also provide security in difficult times, as was copiously demonstrated during the financial crisis. The varieties of largesse are endless, but in short, what government does can affect the health of companies, and so it behooves companies to pay for health care.

None of this is new, in principle, but that does not make it any less problematic for a capitalist political economy. The problem, for those who care about healthy markets, is that in general, market actors should be focused on their business and should attempt to work as effectively as possible. And in general, in the business tradition of the United States and the liberal tradition going back through Adam Smith, competition requires market actors to do a good job, or else face impoverishment. In purchasing political influence, however, market actors gain an advantage over their competitors not by building a better mousetrap, but through the “market” in influence. Among economists, such influence is generally called “rent-seeking” legislation—that is, it is legislation that conveys an advantage immune to competitive pressure (called a “rent”).<sup>201</sup>

Rent-seeking legislation is presumably in the interest of the corporation’s shareholders. A company that receives a lucrative government contract, a favorable regulation, a bail-out, or that is allowed to protect a monopoly, makes more money than the same company would if it did not receive such a

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<sup>201</sup> “Rent seeking” was a term used in the political context by Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974). It is also associated with Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967).

benefit. Companies may decide that they wish to be like Goldman Sachs rather than like Lehman Brothers.<sup>202</sup> Insofar as government action conveys a rent, however, the government action raises not only corporate profits but prices, and is thus against the interests of consumers, and of course competitors.

In some cases, moreover, managers may approach the government for favors that, when granted, are not shared with the stockholders. For example, corporate management may be interested to see that corporate governance reforms, e.g., restrictions on executive compensation, are not enacted, even if such reforms might be helpful to the owners of the corporation. In that case, the legislation in question hurts shareholders, too.

To make matters worse, *Citizens United* fosters a collective action problem, in which corporations may be economically compelled to make campaign expenditures, because their competitors have made such expenditures. Consider whether a player in a highly regulated industry can afford to ignore a competitor's efforts to curry favor. Rent-seeking is now no longer discouraged; it may come to be required.<sup>203</sup> Ironically enough, in order to remain "competitive," companies may have to engage in anti-competitive behavior.

The establishment of a courtier economy breeds cynicism. People may not wish to enter markets if they believe the fix is in; in such circumstances, confidence may erode and enterprise may slow. As the sluggish credit markets and faint demand following the financial crisis have demonstrated anew, employment, to say nothing of growth, is difficult to achieve when confidence lags. And sometimes the lack of confidence can be traced to a belief that markets operate according to rules other than fair and open competition. Traditionally, therefore, business law has sought to ensure that markets were perceived to be competitive. Consider, in this regard, the information forcing and anti-fraud provisions of the securities laws, especially insider trading law, as well as antitrust law. For much of U.S. history, investors and consumers have believed that markets were tolerably fair and open—at least they participated in vast numbers. Perhaps as a result, U.S. markets have historically operated with great liquidity, widely believed to aid prosperity.

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<sup>202</sup> During 2008, at the most dramatic stage of the financial crisis, the government protected Goldman Sachs in numerous ways, to the tune of billions of dollars. Lehman Brothers was allowed to fail. See Joe Nocera, *Lehman Had to Die, It Seems, So Global Finance Could Live*, N.Y. TIMES, Sept. 12, 2009, at A1.

<sup>203</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 973 (2010) (Stevens, J., dissenting) (quoting Supplemental Brief of the Committee for Economic Development as Amicus Curiae in Support of Appellee at 3, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205)).

It is true that corporations have long been allowed to use money from the general treasury to support charitable causes, so long as some benefit to the corporation and its shareholders can be discerned, a principle traditionally taught through the chestnut *A.P. Smith v. Barlow*.<sup>204</sup> At least since the reign of Queen Elizabeth I and the passage of the Statute of Charitable Uses, the Anglo-American legal tradition has encouraged charitable giving—that is, payments in furtherance of social goods such as the care of the poor and infirm, education, and the like.<sup>205</sup> At some level of generality, such expenditures might be understood as both “speech” and “politics.”

But charity has traditionally been understood as a virtue, a kind of selflessness, in principle distinguishable from political ambition. The tax code attempts to distinguish pure charitable giving, from policy advocacy, from campaigning for specific candidates. Specifically, the tax treatment of purely charitable institutions (denominated § 501(c)(3) by the Code) differs from the treatment of institutions devoted to political advocacy (denominated § 501(c)(4) or § 501(c)(6)).<sup>206</sup> (Again, *Citizens United* was a 501(c)(4) organization.)<sup>207</sup> Purely charitable institutions are tax-exempt, and donations to them are tax-exempt.<sup>208</sup> A § 501(c)(4) organization is structured for political purposes—issue advocacy—but may devote some of its revenues to political campaigns, so long as campaigning is not the primary purpose of the organization.<sup>209</sup> Money devoted to political campaigns may be taxable; contributions to such organizations are not tax exempt. There is much more to say—election law is complicated, even after *Citizens United*—but for present purposes it suffices to note that election law and the tax code have traditionally avoided, or at least not addressed, the problem of rent-seeking masquerading as charity. As a practical matter, for the overwhelming

<sup>204</sup> *A. P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 585 (N.J. 1953).

<sup>205</sup> Charitable Uses Act, 34 Eliz. 1, c. 4 (1601) (Eng.).

<sup>206</sup> I.R.C. § 501(c) (2007). Organizations exempt from tax under § 501(c)(3) are “[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.” By contrast, § 501(c)(4)(A) exempts organizations that are “[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.”

<sup>207</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 936 (2010).

<sup>208</sup> I.R.C. § 170(a)(1), (c)(2)(D) (2007).

<sup>209</sup> I.R.C. § 501(c)(4) (2007); 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii); see also Rev. Rul. 81-95, 1981-1 C.B. 332.



majority of charitable institutions—the vast web of not-for-profits that constitute so much of U.S. civil society—the problem of lobbyists disguised as saints simply does not arise.

In a capitalist society, markets are key political mechanisms. And like elections or courts or any other political mechanism, markets have rules that establish how the mechanism works. Business law has a lot to teach about the sensible conduct of business relations, that is, about what our rules should be. And among the oldest lessons of business law is that businesses should be disciplined by competition, and that businesses will rationally seek to avoid competition.<sup>210</sup> Therefore, the law should oppose the tendency of firms to seek legal advantage to the detriment of their competition, and ultimately consumers. *Citizens United* is wrongly decided because it encourages the subversion not only of our democracy, but also of our capitalism.

## VII. CONCLUSION

From the perspective of a commercial republic, *Citizens United* is simply wrong. A commercial republic like the United States uses law, understood as a fairly objective professional discourse at some odds with both democratic politics (voting) and markets (payment), to set boundaries between and among various mechanisms of social interaction. At least traditionally, law has maintained fences.

In *Citizens United*, the Supreme Court tore down fences. The Court's decision makes it almost impossible to keep the discourse of elections distinct from the discourse of markets. As numerous commentators, not least the dissenting Justices, have argued, this is bad for our understanding of democratic self-governance. What this Article has endeavored to show is that the Court's blurring of distinctions among modes of social decision, campaigns, and markets, is bad for sound markets. If we turn our attention from citizens to corporations, from speech to payment, and from campaigns or legislatures to markets, the *Citizens United* decision is impossible to square with the political economy entailed in the U.S. business law tradition.

As discussed in Part IV, corporate speech is inherently commercial speech and, therefore, subject to regulation. Moreover, failure to understand the distinction between shareholders and managers results in shifting undue power to managers.

As discussed in Part V, the state has the authority to regulate payments. The state also has the authority to regulate other kinds of speech in markets.

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<sup>210</sup> ADAM SMITH, THE WEALTH OF NATIONS 122–37 (Edwin Cannan ed., Bantam Classic 2003) (1776).

In an information economy, the regulation of communication is integral to the construction of markets.

As discussed in Part VI, keeping managers from becoming lobbyists makes perfect sense, because lobbying undermines competition and thereby corrupts markets.

There are a number of ways that the *Citizens United* decision might be rolled back, and the nation's commitment to being a commercial republic reaffirmed. Most elegantly, the Constitution could be amended.<sup>211</sup> Several states have requested Congress to circulate a proposed constitutional amendment to the states, and a bill was introduced in the House.<sup>212</sup> But amending the Constitution is difficult and seems unlikely.

The Supreme Court could in due course overrule *Citizens United*, or at least restrict it to its facts, marginalizing the broader holdings as dicta. Presumably, overturning *Citizens United* would require new appointees to the Court. While it might cure some of *Citizens United*'s substantive flaws, a judicial about-face would hardly help allay the widespread suspicion that the Court is an essentially partisan institution.

Legislation provides another approach to undoing *Citizens United* and achieving the intentions of BCRA. It has been proposed in Congress that government only contract with firms that limit their political activity.<sup>213</sup> This and a number of similar proposals were incorporated into the Disclose Act, which passed the House in 2010, but stalled in the Senate.<sup>214</sup> After the Republicans took control of the House, and at least some Democrats appear to have decided that they should respond by raising more money than the Republicans,<sup>215</sup> the prospects of the Disclose Act appear dim.

State legislatures could amend their corporate law statutes to require corporations chartered under their law to refrain from political activity.<sup>216</sup> It seems unlikely, however, that states that compete for incorporations would take such a step, for fear of losing their "business" to other states. Moreover,

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<sup>211</sup> The novelist and lawyer Scott Turow has called for a constitutional amendment overruling the Supreme Court's understanding of corporations as "persons" with the same free speech rights as natural persons. Scott Turow, Op-Ed., *Blagojevich and Legal Bribery*, N.Y. TIMES, Aug. 18, 2010, at A23.

<sup>212</sup> See Dave Homstein, *No Shortage of Proposals for Restoring Democracy After the Citizens United Decision*, DETROIT EXAMINER, Feb. 2, 2010.

<sup>213</sup> Bruce Ackerman & Ian Ayres, Op-Ed., *A Hatch Act Reply to the High Court*, WASH. POST, Jan. 26, 2010, at A15.

<sup>214</sup> Dan Eggen, *Bill on Political Ad Disclosures Falls Short in Senate - Democrats Shy of 60 Votes Setback for Bid to Curb Corporate Spending*, WASH. POST, July 28, 2010, at A3.

<sup>215</sup> See Manu Raju, *Senate Dems Launch 'Super-Pac'*, POLITICO, (Feb. 23, 2011, 5:47 AM), <http://www.politico.com/news/stories/0211/50010.html>.

<sup>216</sup> Legislation has been proposed in Iowa, New York, and Wisconsin. See *Legislative Proposals Responding to Citizens United*, SOURCEWATCH, [http://www.sourcewatch.org/index.php?title=Legislative\\_Proposals\\_Responding\\_to\\_Citizens\\_United](http://www.sourcewatch.org/index.php?title=Legislative_Proposals_Responding_to_Citizens_United) (last visited Oct. 10, 2011).

the Supreme Court has already signaled that a law prohibiting speech as a condition of incorporation would be viewed as stripping away inherent rights to free speech, and therefore unconstitutional.<sup>217</sup>

In a similar vein, corporation law understandings of what boards of directors do could be expanded and reinforced so that the board of directors came to understand itself as a politically responsible body.<sup>218</sup>

The Securities and Exchange Commission could require that listed corporations disclose their political participation. In general, however, the SEC has been hesitant to require disclosure of matters that do not impact the corporation's profitability in fairly direct fashion.<sup>219</sup>

There are no doubt other ways to mitigate the impact of the *Citizens United* decision, but a more fundamental problem presents itself. The remedies to a bad decision offered here, and the criticism offered through Parts IV–VI of this Article, crucially depend on the assumption that the political imagination with which we think through legal problems is the commercial republic familiar to U.S. business law, in which it makes sense to distinguish between voting, legal reasoning, and buying.

As discussed in Part III, it is clear that a current majority of the Supreme Court does not think in such republican terms. Perhaps the Court's change of heart and mind was inevitable, rather than accidentally bad thought. The United States is the third most populous nation in the world.<sup>220</sup> China, India, and the European Union, polities of similar or greater size, have more or less substantial democratic deficits. We are all a long way from Rousseau's Geneva, where citizens might hope to know one another directly, or perhaps with a degree of human separation. Communicating with hundreds of millions requires vast sums of social capital, either money or in some places, party control. So perhaps it is naïve to believe that republican democracy can be long preserved, and a raucous oligarchy is likely to be preferred to various forms of more organized authority. From this vantage, maybe the Court's primitive imagination of our society's structure is to be commended for its honesty if not its sophistication. Perhaps, as Justice Jackson said when our constitution was threatened by executive overreaching, our republican

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<sup>217</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 905 (2010) (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

<sup>218</sup> See Yosifon, *supra* note 18, at 1229; Bebchuk & Jackson, *supra* note 71, at 97–105.

<sup>219</sup> Amy Deen Westbrook, *Sunlight on Iran: How Reductive Standards of Materiality Excuse Incomplete Disclosure Under the Securities Laws*, 7 HASTINGS BUS. L.J. 13, 29, 61 (2011) (offering a discussion and bibliography of shifting standards of materiality).

<sup>220</sup> *U.S. Projected to Remain World's Third Most Populous Country Through 2050*, Census Bureau Reports, U.S. CENSUS BUREAU (June 27, 2011), [http://www.census.gov/newsroom/releases/archives/international\\_population/cb11-116.html](http://www.census.gov/newsroom/releases/archives/international_population/cb11-116.html).

“institutions may be destined to pass away.”<sup>221</sup> Those things said, Justice Jackson was right to conclude that “it is the duty of the Court to be last, not first, to give them up.”<sup>222</sup>

If our republican sensibility in fact passes from the scene—as it evidently already has for the *Citizens United* majority—then we should begin assessing our institutions—and for that matter, educating—in accordance with virtues more appropriate for a society that celebrates the attainment of privilege over others. But what would modern aristocracy look like? And how is the United States, which began by abolishing titles,<sup>223</sup> discussing nobility?

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<sup>221</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952).

<sup>222</sup> *Id.*

<sup>223</sup> U.S. CONST. art. I, § 9, cl. 8.

